STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service.	)))	Docket No. 00-0393 (Rehearing)

JOINT CLECS' INITIAL BRIEF ON REHEARING (PUBLIC)

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August 3, 2001

JOINT CLECS' INITIAL BRIEF ON REHEARING

AT&T Communications of Illinois, Inc.; Covad Communications Co.; Rhythms Links, Inc.; Sprint Communications Company L.P. d/b/a Sprint Communications L.P.; and WorldCom, Inc. (collectively, "Joint CLECs"), by their attorneys, respectfully request the Commission to affirm its March 14, 2001 Order in this docket with certain minor modifications. The Commission's March 14 Order is consistent with the rehearing order in the Covad/Rhythms Arbitration, which affirmed the initial Covad/Rhythms order. It is now Round 4 on the DSL unbundling issue and it is clear that SBC/Ameritech has nothing substantive to add -- no new facts to offer, no mistakes of law to correct and no changed circumstances to explain. Instead, the CLECs (and the Commission) are up against the tried-and-true monopoly strategy – delay, delay, and then delay some more. The Commission should put the stake through this strategy once and for all by affirming its initial order and by issuing an interim tariff directing SBC to provide access to the Project Pronto elements on an unbundled basis, permit direct access to the appropriate OSS information and functions, and to allow virtual collocation of line cards.

I. INTRODUCTION

Because it keeps losing on the merits, SBC/Ameritech now seeks to obfuscate the merits. This case is about SBC/Ameritech's legal obligations to provide access to certain elements of its network. It is not a case about non-DSL services like cable modems or fixed wireless or satellites. The case is not about legitimate technical feasibility or cost issues either. The Commission must ignore SBC/Ameritech's irrelevant and misleading arguments. Instead the Commission should focus on the sole issue in this case: Is SBC/Ameritech required to unbundle the network elements that comprise its Project Pronto network? The answer is clearly yes. Project Pronto is nothing more than a loop and, as the Commission knows, both state and federal

law requires ILECs to unbundle loops. Once the Commission determines that Project Pronto loops are subject to unbundling just like any other loop, it necessarily follows that Joint CLECs are entitled to collocate to obtain access to those UNEs and are also entitled to direct access to the OSS to make use of those UNEs. SBC/Ameritech Is Legally Obligated to Provide Joint CLECs Access to the Project Pronto Elements.

SBC/Ameritech spent considerable time in this case railing against the purported evils of unbundling. According to its witnesses, unbundling is unfair and economically unsound. The central problem with this argument is that SBC/Ameritech makes it in the wrong forum. Unbundling is the law of the land. If SBC/Ameritech wants to *change* the law it needs to take its argument to a legislature. Its pleas fell on deaf ears this year in Springfield. Press reports suggest that its federal efforts via the Tauzin-Dingell bill are also doomed. In any event, arguing to the Commission that state and federally mandated unbundling is a bad idea is a waste of everyone's time.

The law requiring ILECs to unbundle their networks is no longer novel. Illinois invented the idea of unbundling network elements, which was later incorporated into the federal Telecommunications Act of 1996. The central goal of TA96 is to enable competition in local telecommunications services and TA96 establishes various ILEC obligations designed to open local markets. The ILEC duty relevant here is the requirement that *ILECs "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis* at any technical feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . .." 47 U.S.C. § 251(c)(3). The Commission must consider whether denying CLECs access to the Project Pronto elements would "impair the ability" of Joint CLECs to provide DSL services. 47

U.S.C. § 251(d)(2)(B). As is further explained below, the federal law and the decisions interpreting that law mandate unbundling of the Project Pronto elements.

SBC/Ameritech also has a corresponding (and independent) state law obligation to unbundle the elements of its network. This state law duty existed before TA 96, *see* Sec. 13-505.6, and was recently reaffirmed and strengthened by the legislature. *See* Sec. 13-801 (signed into law one month ago). Section 13-801 of the Illinois Public Utilities Act requires Ameritech to provide network elements in any manner technically feasible "to the fullest extent possible to implement the maximum development of competitive telecommunications services offerings." The new law also requires SBC/Ameritech to provide CLECs with "any sequence of unbundled network elements that it ordinarily combines for itself." The law could not be any clearer – SBC/Ameritech must provide Joint CLECs access to the Project Pronto network elements.

A. Ameritech failed to prove its new claims of economic or technical infeasibility of unbundling Project Pronto

Faced with black-letter law requiring it to provide access to its Project Pronto network elements and three Commission orders requiring the same, SBC/Ameritech responded with testimony covering every angle it could concoct. Its chief arguments are that unbundling is a bad idea, it's too expensive and it's not technically feasible. As discussed above, debating the pros and cons of unbundling is a waste of time. As for cost and technical feasibility, those arguments crumbled under cross-examination.

1. SBC-Ameritech's Cost Study Was Completely Discredited

The Commission issued its original order in this docket on March 14, 2001. That same day, SBC CEO Ed Whitacre fired off his infamous letter to Congress, complaining that unbundling Project Pronto in Illinois would cost "hundreds of millions of dollars." Interestingly, SBC/Ameritech's cost witness testified on rehearing that SBC had not even begun its Project

Pronto unbundling cost analysis when Mr. Whitacre sent his letter. To no one's surprise, the ex post facto cost study coincided with Whitacre's claim that it would cost "hundreds of millions of dollars" to unbundle Project Pronto. During cross-examination, SBC/Ameritech's cost study was exposed as a hastily prepared, unsupported doomsday scenario. The cost study is a series of worst-case scenarios that build upon each other to the predetermined "hundreds of millions of dollars" figure. SBC/Ameritech's witness admitted that it would not use such a study for its own planning, which makes one wonder why they are trying to foist it on the Commission.

The reason SBC/Ameritech could not produce a defensible cost study is that cost is not the issue. Its Chief Technology Officer admitted under cross-examination that SBC would have suspended Project Pronto even if the cost to comply with the Commission's order was *zero*. SBC/Ameritech is not truly concerned about cost; it wants to control the DSL market segment. It controls 95+% of the local exchange lines in its region and it wants to leverage control of its bottleneck assets to extend that monopoly into other telecommunications services, such as DSL. In other words, it was foreordained that *any* steps the Commission took to promote DSL competition were going to be met with a claim by SBC/Ameritech that those steps would be too expensive. Those financial infeasibility allegations may have looked good in press releases and letters to Congress, but as Joint CLECs explain below, SBC/Ameritech's cost claims collapsed under cross-examination and are entitled to zero weight.

2. The Technical Infeasibility Claims Fail Again.

After cost, SBC/Ameritech's favored argument was technical infeasibility. This should not surprise the Commission because in virtually every case involving competition, Ameritech claims "it can't be done." This claim generally fails as the hearings nearly always reveal that it can be done. That is what happened in the original hearing here. The Commission rejected SBC/Ameritech's technical infeasibility claims in their entirety. Because the claims here merely

repeat the claims in the original hearing with little or no evidence to support them (not to mention no new evidence), the Commission should likewise reject the technical infeasibility claims here.

Each one of the purported technical concerns is baseless For example, SBC/Ameritech claimed that line card collocation could not be done. Yet its witnesses admitted that it could. It claimed that the Litespan equipment could not handle multiple PVPs, yet failed to mention the imminent Litespan upgrade that will enable the handling of multiple PVPs. The Litespan and OCD capacity "issues" were exposed as red herrings by Joint CLECs. This familiar pattern was repeated over and over again during seven days of hearings. There simply is no proof of technical infeasibility. The Commission did not buy this argument the first three times it considered unbundling Project Pronto and nothing in this rehearing should change the Commission's decision.

B. SBC/Ameritech Is Using Litigation to Block DSL Competition.

Given the weakness of its evidence, the undeniable duty to unbundle Project Pronto and the fact that the Commission had already decided the same issues three times against it, one might wonder why SBC/Ameritech sought rehearing. The answer is simple: delay works in favor of the monopolist and litigation is the favored method of delay. In the five years since TA96 was enacted, it has become apparent that the RBOCs will use lawsuits and regulatory proceedings to slow competitive inroads. This rehearing is just another example.

1. The Commission has correctly decided three times before that CLECs should have access to Project Pronto on an unbundled basis and direct access to all OSS information and functionality yet SBC/Ameritech continues to resist implementing the orders.

As noted above, this is the fourth time in 18 months that the Commission has been forced to deal with the Project Pronto unbundling issue. The Commission first dealt with the issue in

the Covad-Rhythms arbitration. ICC Docket No. 00-0312/0313. The petitions there were filed in April 2000 and the Commission issued its Order in August 2000. The Commission ordered SBC/Ameritech to:

(1) provide access to Project Pronto on an unbundled basis;

(2) permit collocation of line cards; and

(3) allow direct access to all OSS information and functionality.

Notably, SBC/Ameritech did not write any letters to Congress or claim that implementation would cost hundreds of millions of dollars. SBC/Ameritech did not comply with the Order but instead filed for rehearing.

The Commission considered the identical issues in the rehearing of the Covad-Rhythms arbitration. SBC/Ameritech put on no evidence of how much it would cost to implement the Commission's Order. In February 2001, the Commission reaffirmed its initial Order and again directed SBC/Ameritech to:

(1) provide access to Project Pronto on an unbundled basis;

(2) permit collocation of line cards; and

(3) allow direct access to all OSS information and functionality.

SBC/Ameritech has not complied with either Covad-Rhythms arbitration order.

The Commission considered the same issues for the third time in the first round of this docket. SBC/Ameritech filed direct testimony in August 2000 and rebuttal testimony in September 2000. Both rounds of testimony were filed *after* the Commission's Covad-Rhythms Arbitration Order. Again, SBC/Ameritech was silent as to how much it would cost to unbundle Project Pronto. The Commission issued its initial order in this docket on March 14, 2001 and directed SBC/Ameritech to:

(1) provide access to Project Pronto on an unbundled basis;

(2) permit collocation of line cards; and

(3) allow direct access to all OSS information and functionality.

All of this litigation might be acceptable if SBC/Ameritech had something to say. It does not. SBC/Ameritech's conduct in this rehearing was a blatant example of abuse of process. In the underlying proceeding, SBC/Ameritech had seven witnesses. In the rehearing, it proffered 13. None of the witnesses from the underlying case testified again; all 13 witnesses were new. The rehearing witnesses were largely unfamiliar with the preceding orders, not to mention the preceding records. They were aware, however, that SBC/Ameritech has made no attempt to comply with the three previous Project Pronto unbundling orders. SBC's testimony in the rehearing stage was duplicative – often word-for-word -- of its original testimony, which the Commission had already rejected. It proffered a mountain of irrelevant testimony on cable modem, fixed wireless and satellite providers, which had absolutely nothing to do with SBC's unbundling obligations under state and federal law. SBC/Ameritech is simply wasting the Commission's time with this nonsense.

2. SBC's goal is to delay until state regulators cave or competitors go bankrupt or it can change federal law

SBC/Ameritech's approach here typifies its familiar "wear down the regulator" strategy. If it does not get exactly what it wants the first time – complete control over DSL in Illinois – then SBC/Ameritech simply tries a second, third and fourth time. The delay strategy also fits nicely with SBC/Ameritech's attempts to pass the Tauzin-Dingell bill in Congress. That bill would eliminate both the DSL-unbundling requirement and state commission authority over DSL. It is difficult to understand how a company can support a federal bill that eliminates its duty to unbundle advanced services while simultaneously telling this Commission that the duty

does not exist, but SBC/Ameritech apparently sees no inconsistency. Regardless, the motivation for delay is clear when one considers that this proceeding (and the Texas, California and Kansas DSL unbundling proceedings) would be eliminated if Tauzin-Dingell passes.

The delay strategy is also useful in eliminating competitors. Since April 2000, when Rhythms filed its DSL unbundling petitions, numerous CLECs have gone bankrupt, including NorthPoint, which was a significant data LEC. Rhythms declared bankruptcy yesterday. Virtually all competitors have seen their stock prices battered as the successful delay strategy by SBC/Ameritech and the other RBOCs has soured Wall Street on the prospects of competition.

The Commission should recognize this testimony and this rehearing tactic for what it was – an attempt to stall DSL competition for 150 days. SBC/Ameritech got its 150-day delay and now the CLECs are entitled to their relief – a fourth order mandating access to Project Pronto elements, line card collocation and direct access to related OSS, and compliance with these orders.

C. Ameritech's Suspension of Project Pronto Is Dubious.

Hopeful that it can eliminate state commission jurisdiction over DSL and its requirement to unbundle Project Pronto, SBC began rattling its saber in Illinois in March 2001 about "suspending" its rollout of Project Pronto unless the Illinois legislature and the Commission caved in. To its credit, the Illinois Legislature ignored SBC's threats and enacted Section 13-517, which mandates a DSL rollout. The Commission should do likewise and ignore the all too familiar saber rattling.

1. SBC/Ameritech's Threat to Suspend Is Not Credible.

Not only are SBC/Ameritech's motives and costs suspect, even its "suspension" is suspect. First, it claims that it suspended Project Pronto in Illinois because of the Commission's orders. Meanwhile, it is telling Wall Street that it suspended Project Pronto because of the poor

condition of Ameritech's outside plant and the related service quality problems. Blaming the Commission for delay caused by Ameritech's failure to invest properly in its network is disingenuous.

Second, it is not clear what SBC/Ameritech means by "suspension." Ameritech's DSL subsidiary continues to sell DSL service in Illinois. SBC/Ameritech continues to do the copper upgrades that are part of the Project Pronto plan. As described in detail below, SBC/Ameritech continues to deploy various other aspects of Project Pronto. Its Chief Technology Officer testified that it could have Project Pronto operational in a matter of weeks, if not days. Therefore, the Commission should question whether Project Pronto has really been suspended in Illinois or whether this is a smokescreen designed to confuse regulators.

2. SBC/Ameritech Has Strong Financial Incentives to Complete the Project Pronto Rollout.

Even if the Commission believes that SBC/Ameritech has truly suspended Project Pronto, it is clear that the suspension must be temporary, not long term. The record is replete with the substantial cost savings, network efficiencies and revenue opportunities associated with Project Pronto. SBC told investors that the maintenance savings alone would pay for Project Pronto. Moreover, the revenue opportunities from the advanced services that can only be provided over the Pronto architecture obviously disappear if Pronto is not rolled out. Finally, SBC/Ameritech submitted voluminous testimony about its need to compete with other broadband providers, particularly cable modem providers. SBC/Ameritech would have a hard time explaining to its shareholders why it is going from a first-mover to a non-mover.

3. The Threat to Consumers Is Hollow.

Finally, Joint CLECs are compelled to comment on SBC/Ameritech's attempts to scare the Commission by claiming that the Commission's orders will somehow deprive Illinois

consumers of Internet access. This claim is grossly exaggerated. SBC/Ameritech can threaten all it wants but Illinois law requires it to make DSL available to 80% of its customers. As to the remaining 20%, only certain of those consumers will be interested in broadband Internet access and, according to SBC/Ameritech, a large percentage of those will choose cable modem, fixed wireless or satellite access. And even if Project Pronto is fully deployed, SBC/Ameritech has never claimed that 100% of its customers will have access to DSL. Of course, all of Ameritech's customers have dial-up access to the Internet and Ameritech testified that dial-up access competes with broadband access. In other words, even if the Commission buys Ameritech's histrionics about suspending Project Pronto, the worst-case scenario effect on Illinois consumers is minimal, with the likely effect nil. The more likely scenario is that SBC/Ameritech will follow its financial incentives (and legal obligations) and continue to deploy Project Pronto throughout Illinois. In summary, if the Commission agrees with Ameritech and reverses its previous procompetitive orders, DSL competition will be virtually eliminated. Illinois consumers would then be at the mercy of the monopoly that told Congress that Illinois consumers "cannot now, and may never, have access to DSL service" unless SBC/Ameritech gets its way. Accordingly, the Commission should affirm its Tariff Order with the minor modifications noted herein and in Joint CLECs' Proposed Order.

II. MUCH OF THE EVIDENCE SUBMITTED BY SBC/AMERITECH ON REHEARING IS LEGALLY IRRELEVANT, CONTRARY TO ESTABLISHED LAW, AND VIOLATES ILLINOIS STANDARDS FOR REHEARING

Joint CLECs recognize the circumstances that the Commission faced in determining whether to grant rehearing in this matter. (See, e.g. Letter from Ed Whitacre to the Honorable J. Dennis Hastert, Speaker of the House, dated March 14, 2001). Faced with the full-court press by SBC/Ameritech to undo at any cost the procompetitive decision of the Commission to require that SBC/Ameritech's Project Pronto network architecture be unbundled, the Commission

understandably has taken extraordinary steps to ensure that SBC/Ameritech has had a full and fair opportunity to demonstrate why the Commission's decision is wrong. Right or wrong, all of SBC/Ameritech's testimony is on the record and, notwithstanding the politics involved, the ALJ and the Commission must now focus on and apply the appropriate legal standards for the evidence presented in rehearing.

As it did in the Tariff Order, the Commission must apply the appropriate legal standard in resolving the issues raised on rehearing. In the Tariff Order, the Commission correctly determined "that it is technically feasible to provide Project Pronto as UNEs" and in requiring unbundling focused on the substantive differences for CLECs to provide xDSL services using the Project Pronto network as contrasted to the alternatives SBC/Ameritech claimed were available to CLECs. (Tariff Order, at 22) The correct legal standard that must be applied here is examination of the services that the CLECs are seeking to offer and whether CLECs' ability to provide such services are materially diminished without unbundling of SBC/Ameritech's local loop network. (*See*, FCC Rule 47 CFR 51.317(b)(1)).

SBC/Ameritech presented testimony of three economists its Chief Technology Officer in support of its argument that the Commission should consider cable modems and fixed wireless offerings as viable alternatives available to CLECs in determining whether Joint CLECs should obtain unbundled access to Project Pronto. Joint CLECs moved to strike the testimony and the Administrative Law Judge in large part granted the motion to strike. While the ALJ's ruling on the motion to strike was ultimately overruled by the Commission resulting in the cable modem and fixed wireless testimony being allowed into the record, the Commission must now determine how much weight the testimony should be given. Joint CLECs respectfully submit that this particular testimony should be accorded no weight.

First, consideration of such evidence is legal error. The FCC unbundling rules are clear. The only legal inquiry is whether, absent unbundling, CLECs' ability to offer the services they seek to offer are materially diminished. Cable modem market share and regulation have no bearing on whether Joint CLECs' ability to offer xDSL service is materially diminished without unbundled access to Project Pronto. (See TA 96, § 251(d)(2)(b); FCC Rule 47 CFR 51.317(b)(1)). Second, the Act and the FCC's unbundling rules go far beyond the antitrust doctrine of essential facilities espoused by SBC/Ameritech's economists and endorse the use of unbundled network elements by CLECs as a means to promote competition. Third, the evidence presented on rehearing in this regard does not meet the appropriate rehearing standards in Illinois law. SBC/Ameritech presented largely duplicative evidence on rehearing and the "new" evidence that was presented, such as the cost "analysis" presented by Mr. Keown and the economic testimony regarding the advanced services market, could have been presented in the proceeding below.

A. The cable modem and other advanced services market information presented by SBC/Ameritech is legally irrelevant because the appropriate unbundling analysis focuses on whether CLECS are impaired in offering the services they seek to offer.

On rehearing SBC/Ameritech tries to sell the Commission on the idea that it must consider advanced services options offered to end users to make a determination on whether Project Pronto should be unbundled. This sales pitch is nothing more than a diversion. While the testimony from three Ph.D. economists and SBC's Chief Technology Officer comparing and contrasting the different entities that provide advanced services in Illinois and elsewhere may be interesting material for marketing professionals or Wall Street analysts, *it has no relevance here.* The unbundling analysis that the Commission must perform on rehearing (as it already has performed in the Tariff Order and in the Rhythms/Covad Arb. Award and Arb. Rehearing

Award) focuses on the "requesting carrier's" or CLEC's options for providing service, not upon the definition of the "market" or alternate providers of advanced services. Here Joint CLECs are seeking to offer DSL services that can provide data and/or voice over landline telephone lines. Joint CLECs are not seeking to offer cable modem or satellite services. These services are not DSL services and Joint CLECs cannot use cable modem or satellite technologies to provide the telephone landline-based xDSL services they wish to offer.

Contrary to the impression that SBC/Ameritech attempts to create, the unbundling obligations of Section 251(c)(3) apply to incumbent LECs and do not apply to satellite, wireless or cable providers. Incumbent LECs like SBC/Ameritech must comply with very specific duties under TA 96. Section 251(c)(3) requires ILECs to give any requesting telecommunication carrier nondiscriminatory access to network elements on an unbundled basis at any technically feasible point. Until the FCC imposed certain advanced services-related conditions in its order approving the SBC/Ameritech merger, the FCC consistently had rebuffed ILECs' attempts to argue that the unbundling requirements of section 251(c)(3) do not apply to facilities used to provide advanced services.

Specifically, the FCC ruled that ILECs are not exempt from Section 251(c) requirements simply because advanced services are involved. "In the Order, we first conclude that the pro-competitive provisions of the 1996 Act apply equally to advanced services and to circuit-switched voice services. Congress made clear that the 1996 Act is technologically neutral and is designed to ensure competition in all telecommunications markets. . . We also clarify that the facilities and equipment used by incumbent LECs to provide advanced services are network elements and subject to the (unbundling) obligations in Section 251(c)(3)." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability,*

Memorandum Opinion and Order, And Notice of Proposed Rulemaking, CC Docket 98-147, FCC 98-188, Released August 7, 1998 ("Deployment Order"), ¶ 11. US West, SBC and other ILECs appealed this Order. The FCC asked the D.C. Circuit Court for an opportunity to address some of the arguments raised on appeal and the Court remanded the case back to the FCC without reaching a decision on the merits. On remand, the FCC (after it had issued the *UNE Remand Order* and the *Line Sharing Order*) again found that "because advanced services are telecommunications services, an incumbent LEC (as defined in section 251(h)) must provide nondiscriminatory access to network elements used to provide xDSL-based advanced services consistent with the requirements of section 251(c)(3)." *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand,* CC Docket 98-147, FCC 99-413, Released December 23, 1999 ("Order on Remand"), ¶ 10.

The D.C. Circuit Court has confirmed twice within the last seven months the FCC's conclusion that network elements used to provide advanced services are subject to the unbundling obligations of Section 251(c). On January 9, 2001, in considering the FCC's Order approving the SBC/Ameritech merger which allowed SBC/Ameritech to establish separate affiliates for advanced service, the Court held that the FCC wrongly permitted the SBC/Ameritech ILECs to avoid Section 251(c) unbundling and resale obligations by offering advanced services through a separate affiliate. (*ASCENT v. FCC*, 235 F.3d 290 (D.C. Cir. 2001.)) Then on April 20, 2001, on appeal of the Remand Order, the D.C. Circuit Court again upheld the FCC's application of Section 251(c) duties upon ILECs that are providing advanced services. The Court stated, "Accordingly, we find no error in the Commission's conclusion that it can apply the § 251(c) duties to a firm that met the § 251(h) criteria on February 8, 1996 and is

still providing 'exchange access' or 'telephone exchange service.'" (*WorldCom, Inc. v. FCC*, 246 F.3d 690, 694 (D.C. Cir. April 20, 2001).

The controlling law on the application of Section 251(c) to advanced services is clear. Advanced services and the network elements used to provide them -- like those included in Project Pronto -- are subject to the same unbundling requirements as voice services and the network elements – like those included in Project Pronto – used to provide those services. The FCC and the courts have concluded that TA 96 as it applies to the unbundling obligations of incumbent LECs is technology neutral. This is the law of the land. What is at issue here is whether CLECs are impaired in providing the services they seek to offer under the relevant FCC rules without access to the Project Pronto elements, not whether SBC/Ameritech has competitors in the broadly defined advanced services market that are not subject to unbundling requirements. For these reasons, evidence on the market share of cable modems or fixed wireless should be disregarded.

Ameritech invariably will argue in its briefs (as it has in testimony) that the "totality of the circumstances" factor from FCC rule 51.317(b)(1) is a reason why the cable modem and other advanced services market information should be considered. Review of the rule and the UNE Remand Order demonstrate that the totality of the circumstances analysis concentrates on whether the requesting carrier, the CLEC, can provide the services it seeks to offer (telephone landline-based xDSL services here) without access to the unbundled network elements of the incumbent LEC.

> We agree with those parties that argue that we must consider the totality of the circumstances to determine whether an alternative to the incumbent LEC's network element is available in such a manner that a requesting carrier can realistically be expected to actually provide service using the alternative. We therefore take into account alternatives that are available through self-

> provisioning and from third party suppliers, and we consider the extent to which these alternatives are available as a practical, economic and operational manner. *UNE Remand Order*, ¶62.

Thus, the only relevant evidence in considering the totality of the circumstances is whether Joint CLECs can self-provision or obtain from third party suppliers the network elements needed to provide the services they seek to offer – xDSL services. A look at the totality of the circumstances does not involve an examination of whether substitute services are available using competing technologies. (Sprint Rehearing Exh. 4.0 (Staihr), p. 14). In other words, the Commission should not consider the availability of cable modems for consumers that provide high speed Internet access in determining if CLECs are impaired from provisioning xDSL service without access to the fiber/copper loops of Project Pronto.

In addition to misdirecting the Commission on the appropriate impair analysis, SBC/Ameritech's cable modem testimony is also offered to complain about alleged asymmetrical regulation. Mr. Ireland stated, "The Order discourages investments in DSL equipment by Ameritech Illinois (and other ILECs) by subjecting ILECs to burdensome and costly regulatory duties while its direct competitors in the advanced services market – cable modem service providers, wireless service providers, and satellite service providers – face no such regulation or similar costs." (SBC/Ameritech Rehearing Exh. 1.0 (Ireland), at 21). The testimony of economists Aron, Levin and Crandall repeat this same mantra. (See, e.g., SBC/Ameritech Rehearing Exh. 8.0 (Aron), at 13; SBC/Ameritech Rehearing Exh. 11.0 (Levin), at 6-10; SBC/Ameritech Rehearing Exh. 2.0 (Crandall), at 6-10). SBC's position that ILECs and cable companies should be treated equally is not within the bounds of permissible advocacy or the Commission's jurisdiction. To make such an argument is not really a criticism of the Tariff Order, but rather a flouting of the law. In no way does TA 96 require equal regulation of cable and telephone companies. If what SBC/Ameritech truly seeks is a change in the requirements of

TA96, it is in the wrong forum. SBC/Ameritech has the ability to seek changes in the law and it in fact has sought such changes. See Attachment 2.

The plain language of TA 96 – confirmed by its purposes, policies, context, and legislative history – is completely contrary to the notion that Congress intended "parity" in treatment of ILECs and cable companies. Both operate under distinctly different regulatory schemes. Moreover, it not only regulates cable and telephone companies differently, but does not even establish parity among telephone companies. Indeed, it establishes certain rules applicable only to carriers (47 U.S.C. §251(a)), others applicable only to LECs (47 U.S.C. §251(b)), others applicable only to ILECs (47 U.S.C. §251(c), and still more applicable only to RBOCs (47 U.S.C. §§ 271-275). The parity that Congress *did* require is parity of access to network elements; the FCC has ruled unequivocally that an "unbundled network element provided by an incumbent LEC [to a requesting carrier] must be at least equal-in-quality to that which the incumbent LEC provides to itself." *First Report and Order*, at ¶ 312. Yet, five years later, SBC/Ameritech is trying to undo this bedrock principle by upgrading its network but seeking to prevent requesting carriers from securing parity access to the upgraded network elements. The Commission should have no patience for such subversions of the law.

SBC's claims of disparate regulation, though legally irrelevant, are also highly misleading. It is not the case that telephone companies are saddled with all manner of burdens, while cable companies are exempt from regulation. In truth, cable operators carry myriad burdens that telephone companies do not. For example, unlike ILECs, cable companies must obtain a local franchise in every community they wish to serve, 47 U.S.C. § 541; they must pay local franchise fees on their entire gross revenues, 47 U.S.C. § 542; they must carry local broadcast signals without any compensation, 47 U.S.C. § 534; etc.; etc. Title VI of the

Communications Act sets forth a detailed scheme of regulation that is *different* from that which applies to telephone companies, but this has no relevance whatever to SBC/Ameritech's obligations under Title II.

In sum, cable operators, fixed wireless providers and satellite providers are not subject to the requirements of Section 251(c) of the Act because they were not ILECs on the date the Act was passed. CLECs have no legal right or practical ability to obtain the advanced services network elements they need from those providers. Claims of asymmetrical regulation are inconsequential. Instead, the Act and the FCC's impairment analysis focuses on whether the lack of access to the ILEC's network element "materially diminishes a requesting carrier's ability to provide the services it seeks to offer." (*UNE Remand Order*, ¶ 51) Here Joint CLECs seek to provide telephone landline-based xDSL services. Since the FCC twice ordered and the D.C. Circuit Court has twice affirmed that the section 251(c) unbundling and resale obligations apply to incumbent LECs' advanced services and the network infrastructure used to provide those services, this Commission cannot deviate from the fundamental concept that SBC/Ameritech must unbundle network elements used to provide advanced services. In conducting its analysis, the Commission must be governed by the undisputed facts in this case – that is that Joint CLECs are seeking to provide telephone landline-based xDSL services and the question is whether Joint CLECs are impaired in offering these services without access to SBC/Ameritech's Project Pronto unbundled network elements.

B. As acknowledged by SBC/Ameritech's economists, the Act and the FCC's unbundling rules go far beyond the antitrust doctrine of essential facilities and endorse the use of unbundled network elements by CLECs as a means to promote competition.

In addition to its thinly veiled attempt to divert the Commission's attention away from the appropriate application of the impair standard under TA96 and FCC Rule 51.317(b),

SBC/Ameritech presented the testimony of three economists that is contrary to well-established principles in promoting competition in the local telecommunications markets. The gang of three SBC/Ameritech economists urge the Commission to deny unbundling of Project Pronto because, in essence, they believe that the use of UNEs provides minimal competitive benefit and complete facilities based competition is the only real competitive solution. In other words, since SBC/Ameritech threatens to never finish deployment of Project Pronto if the Commission affirms the conclusions it reached in the Tariff Order, there will be no competitive threat to the services offered by cable modem providers. This viewpoint is wrong for several reasons. First, as Joint CLECs will demonstrate below, the risk that SBC/Ameritech will not finish deployment of Project Pronto is very low. Second, Congress and the FCC expressly have found that UNE-based service offerings by CLECs promote competition and are a transition to complete facilities based competition.

The SBC/Ameritech economists present the narrow view that the only good competition is complete facilities based competition and that unbundling of ILEC network elements should only occur for essential facilities (See, e.g., SBC/Ameritech Rehearing Exh. 8.1 (Aron), at 4; SBC/Ameritech Rehearing Exh. 11.1 (Levin), at 7; SBC/Ameritech Rehearing Exh. 2.0 (Crandall), at 14; Rehearing Tr. (Levin), at 2079, 2095-2096). This view is contrary to TA 96, the FCC's *UNE Remand Order*, and the writings of SBC/Ameritech's economist, Dr. Crandall. First, the FCC explicitly recognized the importance of providing CLECs access to unbundled network elements in the *UNE Remand Order*.

> We continue to believe that the ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is integral to achieving Congress' objective of promoting rapid competition to all consumers in the local telecommunications market.

> Moreover, in some areas, we believe that the greatest benefits may be achieved through facilities-competition, and that the ability of requesting carriers to use unbundled network elements, including various combinations of unbundled network elements, is a necessary precondition to the subsequent deployment of self-provisioned network facilities.
>
> Although Congress did not express explicitly a preference for one particular competitive arrangement, it recognized implicitly that the purchase of unbundled network elements would, at least in some situations, serve as a transitional arrangement until fledgling competitors could develop a customer base and complete the construction of their own networks. In particular, Congress stated "[I]t is unlikely that the competitors will have a fully redundant network in place when they initially offer local service because the investment is so significant. Some facilities and capabilities … will likely need to be obtained from the incumbent [LEC] as network elements pursuant to new section 251." *UNE Remand Order*, ¶¶ 5-6, quoting Joint Statement of Managers, S.Conf. Rep. No. 104-230, 104th Cong. 2d Sess., at 148 (1996); *see also, Id.* at ¶ 13.

As the FCC stated, Joint CLECs need unbundled access to SBC/Ameritech's network to promote competition in the local telecommunications market and to allow for the investments in their own facilities.

Moreover, in a study written by SBC/Ameritech economist, Dr. Crandall, in June 2001 paid for by SBC/Ameritech, Dr. Crandall draws several conclusions that are germane here. Although Dr. Crandall concludes that a complete facilities based strategy for CLECs is optimal, he concedes that the use of unbundled network elements play an important role in promoting competition. Dr. Crandall states in his paper that "[a] clever CLEC may be able to utilize UNE leasing, while also improving the ILEC network to generate cost savings and service advantages; eventually, an efficient and cost-conscious CLEC will be able to leverage these investments and move to an on-net (completely facilities based) platform." (Sprint Crandall Rehearing Cross Exh. 1, at 25). Dr. Crandall testified in the rehearing that he sees no reason why such an analysis also would not apply to CLECs using unbundled network elements to provide advanced services.

(Rehearing Tr. (Crandall), at 608:8-22. Also relevant here are Dr. Crandall's conclusions in his study that total service resale by CLECs is a bad strategy:

> To attract customers from their existing local carriers, CLECs likely must offer more than the same services and the promise of comparable service quality to that provided by the existing local carriers. The typical local residential bill is only about $34 per month. Even if an entrant could offer service at a cost below the current regulated residential rates, the potential savings to residential subscribers would be so small that few customers would be likely to change providers unless the new service offered something different from the incumbent's traditional services. (Sprint Crandall Rehearing Cross Exh. 1, at 19-20).

The Broadband Service offered by SBC/Ameritech as an alternative to Project Pronto unbundling is the identical service that SBC/Ameritech is offering – namely, the total service resale offering that Dr. Crandall finds to be inconsequential from a competitive standpoint. As will be demonstrated below, the offer of the Broadband Service is not acceptable for Joint CLECs for the same reasons that Dr. Crandall presents in his SBC/Ameritech-sponsored study. With the Broadband Service alternative, Joint CLECs cannot differentiate their service from that of SBC/Ameritech enough to get customers to switch from the incumbent provider.

While Congress. the FCC, and even SBC/Ameritech's own economist have made it abundantly clear that they see UNE based competition as being very important in the development of facilities-based competition, the SBC/Ameritech economists espouse the view that only essential facilities, as that term is used in antitrust law, should be unbundled. (SBC/Ameritech Rehearing Exhs. 11.0 and 11.1 (Crandall); SBC/Ameritech Rehearing Exh. 8.1 (Aron) at 5). This view, however, is directly contrary to settled law. The FCC explicitly found in the *UNE Remand Order* that the ILEC unbundling requirements are much broader than would be justified by traditional essential facilities analysis. The FCC stated:

> We find it [the essential facilities doctrine] to be of limited assistance in our analysis of the unbundling obligations of the Act

> because…the Act plainly imposes on incumbent LECs a broader duty to deal with competitors than does the essential facilities doctrine. In particular, the essential facilities doctrine differs from the analysis the Commission must undertake under section 251(d)(2) because Congress has already created an affirmative obligation for incumbent LECs to make their facilities available to competitors. Specifically, section 251(c)(3) imposes on incumbent LECs a general obligation to provide access on an unbundled basis to any network elements that the Commission identifies under section 251(d)(2). This obligation is not limited to situations in which the incumbent is misusing control of a unique facility to foreclose competition in a downstream market. **Rather, section 251(d)(2) requires incumbents to share their facilities if competitors are merely "impaired" in their ability to provide services they seek to offer.** *UNE Remand Order*, ¶ 60 (emphasis added).

When Joint CLEC economists Dr. Staihr and Terry Murray questioned the relevance of SBC/Ameritech economist Dr. Levin's use of the essential facilities doctrine (see, e.g., Sprint Rehearing Exh. 4.0, at 14), he was forced to acknowledge that the FCC has found the doctrine to be of limited assistance yet amazingly still thinks the Commission should consider the essential facilities doctrine in determining whether Project Pronto facilities should be unbundled. (SBC/Ameritech Rehearing Exh. 11.1, at 5-6). On cross-examination, SBC/Ameritech economists Aron and Levin also acknowledged that the FCC rules go beyond the essential facilities doctrine. (Rehearing Tr. (Aron), at 1608:8-22; (Levin), at 2083). Perhaps acknowledging the FCC's viewpoint of the essential facilities doctrine, Dr. Levin's rebuttal testimony is littered with equivocation and qualifications. For example, Dr. Levin posits that the Commission should not unbundle Project Pronto "if at all possible" (SBC/Ameritech Rehearing Exh. 11.1, at 2, 5, 11) and customers will more likely benefit if SBC/Ameritech voluntarily unbundles its network. (SBC/Ameritech Rehearing Exh. 11.1, at 8). In addition, Dr. Levin, being a former ICC Commissioner, acknowledges that the Commission as a creation of statute must follow well-established law and if required by law to unbundle it must do so. (Rehearing

Tr. (Levin), at 2084, 2092). Moreover, as the Commission is well aware since the passage of the Act SBC/Ameritech has not voluntarily unbundled any of its network elements. The Commission need not look any further than its struggles to force SBC/Ameritech to unbundle the shared transport network element for evidence of whether SBC/Ameritech will voluntarily unbundle its network elements. Simply put, the notion that SBC/Ameritech can be relied on to voluntarily unbundle any network elements is belied by SBC/Ameritech's well-documented history of resisting unbundling requirements.

In sum, the testimony on rehearing of the SBC/Ameritech economists provides no justification that would warrant a different outcome than the Commission reached in its Tariff Order. UNE-based competition and its benefits are well recognized. Pontifications about what SBC/Ameritech believes is the "best" type of competition cannot change the requirements of TA96 or FCC's orders which demonstrate the necessity of UNE based competition. Moreover, the essential facilities doctrine has no value in determining if Joint CLECs are impaired from offering the services they seek to offer. The Commission's analysis must be cognizant of the benefits that will inure to consumers when SBC/Ameritech is required to unbundle its Project Pronto network architecture. Consumers will have more choices for advanced telecommunications services, in particular telephone landline-based xDSL services, CLECs will be able to introduce new and innovative services, and robust competition will produce efficiencies, a controlling effect on prices, and other benefits consistent with the pro-competitive goals of TA96. (Sprint Rehearing Exh. 4.0, at 6).

C. The Evidence on Rehearing does not meet Illinois rehearing law standards.

While the Commission understandably wanted to give SBC/Ameritech a full and fair opportunity to make its case on rehearing, it went beyond the parameters of its own rules by allowing all of SBC/Ameritech's proffered evidence into the record on rehearing. In particular,

much of the evidence that the Commission ruled should be allowed into the record does not meet the standards for rehearing set forth in Illinois law. The purpose of rehearing is to provide the Commission with an opportunity to correct any legal or procedural errors made in its order before resort is made to a court. (220 ILCS 5/10-113; Citizens Utility Brd. v. Illinois Commerce Commission, 166 Ill.2d 111, 651 N.E.2d 1089, 1100 (1995)). Such rehearing may be based solely on the record of the hearing. (83 Ill Adm. Code 200.880). But if a party chooses to allege new facts, the application for rehearing "must state with specificity the issues for which rehearing is sought." (*Id.*)

By any reasonable measure, SBC/Ameritech and much of the testimony it proffered did not comply with the standards for rehearing. For instance, one allowable basis for rehearing is the presentation of new evidence that SBC/Ameritech could not have presented at the time of hearing. (Marathon Oil v. Illinois Commerce Commission, 52 Ill App. 3d 36, 367 N.E.2d 209 (5th Dist. 1977). With few exceptions, SBC/Ameritech has not presented new and material evidence that was unavailable to it during the pre-hearing and hearing phase of the initial proceeding in this docket. Rather SBC/Ameritech has with the vast majority of its testimony done nothing more than reargue the same issues that were fully litigated and addressed by the Commission in its Tariff Order, perhaps with embellished fervor, heightened repetition and expanded discussion.

In the few instances that arguably presented "new" evidence that was unavailable at the time of the hearing, SBC/Ameritech has not met the rehearing standard of providing "an explanation of why such evidence was not previously adduced." (Commission Rule 200.880)

The only arguably new facts in this case are reflected in the reverse-engineered economic impact analysis Mr. Keown conducted to purportedly show what it would cost SBC/Ameritech to

implement the Commission's Tariff Order and the advanced services market "evidence" presented by the three economists and Mr. Ireland. As shown above, the testimony of SBC/Ameritech's economists must be discounted because it is legally irrelevant in making a determination on whether Joint CLECs are impaired from offering the services they seek to offer. And even if the evidence is not irrelevant, SBC/Ameritech clearly could have presented this evidence in the proceeding below.

For example, Dr. Aron, Dr. Levin, Mr. Ireland and Dr. Crandall provide an extensive testimony and analysis of competitors in the advanced services marketplace. Such analysis clearly could have been provided at the time of the hearing, and there is no legitimate reason to allow SBC/Ameritech to provide it now. There is no substantive difference in the dynamics of the advanced services marketplace in June 2001 (when the testimony was prefiled) that was not present in the fall of 2000 (when such testimony could have been filed in the case below). Further, all of the issues regarding Alcatel NGDLC equipment addressed by Dr. Neil Ransom were known to SBC/Ameritech at the time of hearing and should have been presented at that time. By SBC/Ameritech's own admission, Project Pronto, and the use of Alcatel equipment, has been underway for at least two years. There was no legitimate reason to allow SBC/Ameritech to present this evidence in rehearing, which was available to it at the time of the hearing.

As for Mr. Keown's economic impact analysis, SBC/Ameritech also could have presented this testimony in the case below. Mr. Keown testified that his worst-case analysis was presented to management after the Tariff Order but had to be done in time for SBC/Ameritech to file its petition for rehearing. (Rehearing Tr. (Keown), at 2310-2311). Mr. Keown's worst case analysis could have been presented to the Commission in the case below in response to CLEC

testimony requesting the unbundling that the Commission ultimately ordered. SBC/Ameritech chose not to present such testimony and it did so at its peril.

Indeed, SBC/Ameritech was fully aware of the Project Pronto network elements Joint CLECs are requesting in this proceeding because Rhythms and Covad had requested, and the Commission awarded months earlier, *the exact same list* of network elements in their arbitration with SBC/Ameritech. [1]

Even if it could somehow be argued that the Commission's arbitration decision failed to make clear to SBC/Ameritech Rhythms' and Covad's request for Project Pronto UNEs, Ameritech sought and was granted rehearing on the issue of Project Pronto network elements. After yet another round of testimony, evidentiary hearings and briefing, the Commission upheld the award of the same list of Project Pronto network elements.[2]

Finally, the evidence in this case demonstrated that SBC/Ameritech's internal documents dating from late 1999 through at least August of 2000 described SBC/Ameritech's Project Pronto-related offering to CLECs as **BEGIN CONFIDENTIAL*** XXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXX*****END CONFIDENTIAL** (See, e.g. Rhythms Boyer Rehearing Cross Exhs. 1-3, Covad Boyer Rehearing Cross Exh. 1; and Rhythms Keown Rehearing Cross Exh. 6P). Given the Commission's Orders in the Rhythms/Covad Arb. Award and its decision in the

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1 (Arbitration Decision, *Rhythms/Covad Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Docket Nos. 00-0312/0313, August 17, 2000, at 30-32. (cited hereinafter as "*Rhythms/Covad Arb. Award*").

2 (Arbitration Decision on Rehearing, *Rhythms/Covad Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Docket Nos. 00-0312/0313, February 15, 2001, at 34-35 (cited hereinafter as "*Rhythms/Covad Arb. Rehearing Award*").

Rhythms/Covad Arb. Rehearing Award, when considered in conjunction with SBC/Ameritech's internal documents describing its Project Pronto offering to CLECs as UNEs, it is undeniable that SBC/Ameritech had countless opportunities for Mr. Keown to bring his worst case analysis to the Commission in the case below. SBC/Ameritech clearly violates letter and spirit of Illinois rehearing law because it had every opportunity to raise the cost issue before it embarked on rehearing.

Given the history of the multiple line sharing proceedings in Illinois, it is clear that SBC/Ameritech is now attempting to keep litigating even where there is no legitimate issue to litigate, in an effort to forestall competition. Clearly such tactics fail to live up to the standards of the Commission's rules applicable to rehearings. The strategy has doomed the parties, the Administrative Law Judge and the Commission to live through the Project Pronto unbundling issues in a "Groundhog Day" fashion. Such dilatory conduct appears calculated to create sufficient uncertainty to hinder CLECs' entry into the Illinois local markets and should not be countenanced by the Commission.

The Commission's granting of rehearing is not akin to the opening of the flood gates on a dam. SBC/Ameritech's 13 witnesses and the massive volume of testimony they generated presented stunningly few new nuggets of evidence for the Commission to consider.[3] In its desperation to live up to claims made and the outrage expressed by SBC Chairman Whitacre in his March 14, 2001 letter to Speaker of the House Hastert, SBC/Ameritech could only reverse engineer the purported economic impact of the Commission's Tariff Order to show its implementation would costs "hundreds of millions of dollars," hype the alleged technical

[3] Most of the evidence presented in this proceeding strengthened the Joint CLECs' position. For example, the Texas Public Utilities Commission released an Arbitrator's Award since the decision in this case in which it ordered that Project Pronto be unbundled and offered as UNEs and that CLECs must have access to all OSS data functionality available to SWBT.

difficulty of complying with the Tariff Order and reargue every major substantive litigated below. Those few arguably "new" facts presented on rehearing could have been raised in the case below. While the Commission's decision to allow all of SBC/Ameritech's proffered evidence into the record it is understandable given the pressure that SBC/Ameritech brought to bear, it was nevertheless at odds with the Commission's own rules.

III. FEDERAL AND STATE LAW REQUIRE AMERITECH TO UNBUNDLE PROJECT PRONTO

A. Federal law requires unbundling of the ILECs' network elements regardless of other technologies available to provide advanced services

SBC/Ameritech has sought to make this case much more complicated than it needs to be. It has raised irrelevant policy arguments, invoked selective and out-of-context quotations from FCC orders, conjured up technical difficulties, and otherwise sought to confuse the issues. To put matters in context, it may help to return to first principles -- and, in particular, to focus on the key statutory provisions.

Although the Federal Telecommunications Act of 1996 is a lengthy and complex statute, there is no doubt about its central objective: to create the conditions that would enable competition in local telecommunications services. At the heart of the statutory scheme is a set of obligations that apply uniquely to ILECs. 47 U.S.C. § 251(c). One critical requirement -- and the one that is pivotal here -- is the requirement that ILECs "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technical feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ." 47 U.S.C. § 251(c)(3). In determining whether particular elements should be made available on an unbundled basis, regulators "shall consider, at a minimum, whether . . . the failure to provide access to such

network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B).

That is what this case is about. It is about elements of SBC/Ameritech's network (especially the local loop), the desire of multiple requesting carriers to be able to provide DSL services (and combinations of voice and DSL services) in competition with SBC/Ameritech, and the inability of these requesting carriers to provide the services they wish to offer unless SBC/Ameritech cooperates in providing access to Project Pronto network elements.

The path to implementation of the statutory principles has not been straight, or smooth, or short. Litigation, reconsiderations and clarifications of prior orders, and various proceedings evaluating the application of existing rules to new facts and circumstances have all engendered delays and confusion. Still, the basic thrust of the Act remains clear, as does the FCC's commitment to making UNE-based competition work.

The FCC's *First Report and Order*[4] took major strides forward in a host of areas. Most relevant for present purposes, that order identified the various elements of the ILECs' networks, elucidated the FCC's understanding of each of the statutory provisions, and applied those provisions as elucidated to each element of the ILECs' networks, including the local loop. For example, the FCC had no difficulty in determining that "it is technically feasible for incumbent LECs to provide access to unbundled local loops." *First Report and Order*, at ¶ 377. It also determined that "such access is critical to encouraging market entry." *Id.; see also id.* at ¶ 378 (further explanation of value to competitors and to consumers of requiring loop unbundling). The FCC also determined that competing carriers are free to use unbundled loops to provide

[4] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, Memorandum Decision and Order, CC Docket No. 96-98, FCC 96-325, at ¶ 377 (Aug. 8, 1996), rev'd in part, Iowa Utilities Board v. FCC, 120 F.3d (8th Cir., 1997), rev'd in part, AT&T Corp. v. Iowa Utilities Board, 119 S.Ct. 721, 1999 WL 24568 (1999), (cited hereinafter as "First Report and Order").

high-bit-rate services such as ADSL, (*id*. at ¶¶ 381-382), and that the loop element should be defined in functional terms, and therefore includes integrated digital loop carrier technology or similar remote concentration devices. *Id.* at ¶¶ 383-385. It is important to note that, from the outset, the FCC made plain its understanding that "section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide *any telecommunications services* that can be offered by means of the element." *Id.* at ¶ 292 (emphasis added).

After some intervening developments in the 8th Circuit that do not require attention here, the Supreme Court for the most part affirmed the *First Report and Order* but found it necessary to instruct the FCC to revise its application of the "impair" standard of section 251(d)(2)(B). *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, 1999 WL 24568 (1999) (cited hereinafter as *Iowa Utilities Board*). This ultimately led to the *UNE Remand Order*, where the FCC affirmed the requirement for unbundling of the loop[5] (including specifically digital loop carrier systems and their attached electronics[6]), and obligated ILECs to provide unbundled access to subloops, or portions of the loop that are accessible at terminals in the ILECs' outside plant, at any accessible point.[7] In doing so, the FCC reiterated the principle that loops and subloops, as all network

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5 The Commission modified the definition of the loop network element to include "all features, functions, and capabilities of the transmission facilities . . . between an incumbent LEC's central office and the loop demarcation point at the customer premises." Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, at ¶ 167 (rel. Nov. 5, 1999) (cited hereinafter as "*UNE Remand Order*").

6 *UNE Remand Order*, at ¶ 175. *See also id*. at ¶ 167 (1999) ("[o]ur intention is to ensure that the loop definition will *apply to new as well as current technologies*, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as access is required") (emphasis added).

7 *UNE Remand Order*, at ¶¶ 205-207 ("We believe that a broad definition of the subloop that allows carriers maximum flexibility to interconnect their own facilities at these points where technically feasible will best promote the goals of the Act. Access to portions of the loop element at these points, i.e., access to the subloop, will facilitate rapid deployment of competition, encourage facilities-based competition, and promote the deployment of advanced services. Our intention is to ensure that the subloop definition will apply to new as well as current technologies, and to ensure that competitors will continue to be able to access subloop unbundled network elements as long as that access is required pursuant to section 251(d)(2) standards").

elements, are not limited to particular services and technologies.[8] The FCC also limited the circumstances under which local circuit switching, *UNE Remand Order*, at ¶ 253, and packet switching, *Id*. at ¶ 306, would be unbundled, and exempted certain items (such as operators services and directory assistance) altogether.

Much confusion has been engendered by the FCC's decision not to require the provision of unbundled packet switching, except in limited circumstances. The primary discussion of packet switching occurred in the context of stand-alone, central office-based, packet switches of the sort that at that time were being widely deployed by Covad, Rhythms, Northpoint, and many others, connected to all-copper loops. *See id*. at ¶ 307. Although the FCC found that the lack of access to packet switches would in fact "impair" requesting carriers from competing, the FCC nonetheless refrained from establishing a generalized requirement for unbundling of packet switching. It did so because this result was advocated by two leading "DLECs," Northpoint and Rhythms,[9] and because of its belief that the advanced services marketplace was nascent, that CLECs and cable companies were leading the ILECs in deploying advanced services, and (in the context then under consideration) that ILECs did not possess significant economies of scale compared to requesting carriers. *See id*. at ¶¶ 306-308. The order also determined that packet switching would be unbundled in certain circumstances where a requesting carrier is unable to install its own DSLAM in a remote terminal or obtain spare copper loops necessary to offer the same quality of advanced services. *Id*. at ¶ 313.

The main confusion caused by the *UNE Remand Order* results from SBC/Ameritech's attempt to expand a minor exemption in a way that undermines a broader and more important

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8 *See supra*, nn. [reference two preceding nn.].

9 *See id*. at ¶ 308 n.608. By contrast, of course, Rhythms does not support SBC/Ameritech's effort to evade its unbundling obligations for Project Pronto.

rule. Specifically, SBC/Ameritech has attempted to extend an exemption for stand-alone packet switching into a license to decline to provide access to the full features, functions, and capabilities of the connection between central office and customer premises. The network elements that are relevant to the Project Pronto debate are not packet switches but loops and subloops, which the FCC found to be the "most time-consuming and expensive network element[s] to duplicate on a pervasive scale." *Id*. at ¶ 211. Alternatively, to the extent that the *UNE Remand Order*'s treatment of packet switching is relevant at all, it is the exception to the exemption -- for packet switching at the RT -- that governs.[10] (As discussed below, the criteria which compel the provision of unbundled packet switching are fully satisfied in the Project Pronto architecture.)

Subsequently, in the *Line Sharing Order,*[11] the FCC made plain its intention to assist companies that wish to use unbundled network elements to compete with ILECs in the provision of advanced services. There, the FCC created a new element that is clearly a "loop obligation", requiring ILECs to provide requesting carriers with line sharing, or access to the "high-frequency portion of the loop" on lines where the incumbent provides the voice service. The *spirit and intent* of the line sharing obligation is, and has always been, to provide CLECs access to an

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[10] Likewise, the *FCC Waiver Order* is not relevant to this Commission determination regarding SBC/Ameritech's unbundling obligations with respect to Project Pronto. That order is narrowly confined to issues regarding the ownership of ADLU cards and OCDs under the SBC/Ameritech Merger Conditions. *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket 98-147 and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 98-96, at ¶¶ 2, 9 (rel. August 9, 2000) (cited hereinafter as "*FCC Waiver Order*"). Specifically, the FCC stated: this [*FCC Waiver*] *Order* addresses only the commitments adopted in the SBC/Ameritech Merger Order and the harms addressed therein. Our interpretations and conclusions with respect to the Merger Conditions do not relieve SBC of any obligations under sections 251, 252, or any other provision of the Communications Act of 1934, as amended (the Act) and our implementing rules. Nor do we intend the analysis or conclusions in this Order to constrain or otherwise affect our interpretation of those rules. *FCC Waiver Order*, at ¶ 2; *see also id*. at ¶ 9.

[11] In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98, at ¶ 30 (rel. Dec 9, 1999) (emphasis added) (cited hereinafter as "Line Sharing Order").

ILEC's local loop in order to spare consumers from the extra, needless costs of leasing or building separate lines.[12] Moreover, it is clear from the *Line Sharing Order* that the FCC intended that its rules would be applied in a manner that would encourage competition and encompass new technologies and technological innovation to the fullest extent.[13] Thus, contrary to SBC/Ameritech's claim that regulation of line sharing is unnecessary for advanced service deployment under 706 of the Act, the FCC explicitly recognized that the line sharing element is fully consistent with the FCC's duty to promote the rapid deployment of advanced services to all Americans as set forth in section 706 of the 1996 Act. *Id.* at ¶ 54.

Because the ILECs once again seized on ambiguities to thwart the FCC's pro-competitive intent, the FCC thereafter issued the *Line Sharing Reconsideration Order,*[14] clarifying that the incumbent LECs' line sharing obligation extends to the *entire loop, "even where the incumbent has deployed fiber in the loop.*"[15] To be sure, the FCC's 1999 *Line Sharing Order* spoke in terms of access to copper loop facilities. Even there, however, the FCC did not intend that for a CLEC to be restricted to obtaining access to an upgraded loop at the remote terminal. To the contrary, the FCC clarified in the *Line Sharing Reconsideration Order* that a CLEC "must have

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12 *Line Sharing Order*, at ¶¶ 39 (recognizing that the inability of a competitor to provide xDSL-based services over the same loop facilities that it uses to provide local voice services makes the provision of competitive xDSL-based services to customers that want a single line for both voice and data applications "not just marginally expensive, but so *prohibitively expensive that competitive LECs will not be able to provide such services on a sustained economic basis*"), *see also id.* at ¶¶ 33, 40-41, 56-59.

13 *See Line Sharing Order*, at ¶ 1. *Id*. at ¶ 4 (adopting measures designed to promote the availability of competitive broadband xDSL-based services, especially to residential and small business customers); *Id*. at ¶ 14 (FCC' s rules designed to encourage competition); *Id*. at ¶¶ 21, 26 (given the rapidly evolving technology, line sharing requirements set forth by the FCC do not mandate a particular technological approach); *Id*. at ¶ 27 (any transmission technology is acceptable for shared-line deployment so long as the technology does not degrade the voice portion of the loop).

14 In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98, FCC 01-26, at ¶ 10 (rel. Jan. 19, 2001) (cited hereinafter as "Line Sharing Reconsideration Order").

15 *Id*. Equally significant, the Commission found that line splitting (where the competitive provides both the voice and the DSL service) must be provided to UNE-P CLECs on terms and conditions equivalent to line sharing, without creating discriminatory excess costs or service disruption. *Id*. at ¶¶ 18-23.

the option to access [a fiber-fed] loop at either [the remote terminal or the central office], not the one that the incumbent chooses as a result of network upgrades entirely under its own control." *Line Sharing Reconsideration Order*, at ¶ 11. Critically, the FCC held that "it would be inconsistent with the intent of the *Line Sharing Order* and the statutory goals behind sections 706 and 251 of the 1996 Act [sic] to permit increased deployment of fiber-based networks by incumbent LECs to unduly inhibit the provision of xDSL services." *Id*. at ¶ 13.

As the FCC has repeatedly recognized, granting CLECs unbundled access to the local loop is *paramount* in the effort to foster local competition. Nothing about the architecture of Project Pronto alters the basic functionality of a loop: to provide transmission functionality needed for a customer to send and receive telecommunications signals between his location and his chosen service provider's network. As with all network elements, the local loop is defined by its functionality and is not limited to particular services or technologies. The Project Pronto loop architecture now being installed by SBC/Ameritech provides exactly what the traditional loop has always provided: transmission functionality for telecommunications signals between a customer's premises and the serving ILEC's central office. Likewise, the implementation of Project Pronto loop architecture does not change any of the fundamental legal and policy principles that underscore the FCC's other rules relating to the provision of network elements, including line sharing and subloops.

Thus, consistent with the FCC's decision in the *UNE Remand Order* -- as well as in the *Line Sharing Order* and *Line Sharing Reconsideration Order* -- the Commission should reiterate that CLECs seeking to provide line sharing over the Project Pronto architecture are entitled to unbundled access to the "entire" loop (*see Tariff Order*, at 25, Option f.), as well as all of the subloop elements used to support the provision of transmission functionality between the

customers' premises and SBC/Ameritech's central office. As the Commission has already recognized, such network elements include:

a. Lit Fiber Subloops between the RT and the OCD in the CO consisting of one or more PVPs ("permanent virtual paths") and/or one or more PVCs ("permanent virtual circuits") at the option of the CLEC;

b. Copper Subloops consisting of the following segments:

    i. the copper subloop from the RT to the NID at the customer premises;
    ii. the copper subloop from the RT to the SAI ("serving area interface");
    iii. the copper subloop from the SAI to the NID at the customer premises.

c. ADLU line cards owned by the CLEC and collocated in the NGDLC equipment in the RT;

d. ADLU line cards owned by the ILEC in the NGDLC equipment in the RT;

e. A port on the OCD in the CO; and

f. Any combination thereof, including a line-shared xDSL loop from the OCD port to the NID.

Tariff Order, at 25.

Requesting carriers need access to all of these "piece-parts" of ILEC networks, or to whichever combination of sub-elements best comports with their own assets and business plans. This is the only approach that will fulfill the provisions and policies of the 1996 Act, as discussed above. It is the only approach that fulfills the directives of the FCC's various local competition orders. It is the only approach that will best ensure that Illinois consumer receive the benefits of robust competition in high-speed data services (and in combinations of voice and data services). In short, the ICC's prior rulings are solidly grounded in the law, and they represent the right public policy as well.

Further, SBC/Ameritech will likely attempt to persuade this Commission that section 261(c) of TA96 can be read to permit the company to evade its section 251(c)(3) obligations to unbundle Project Pronto. The statute, in relevant part, provides that nothing in TA96 "precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition . . ." (TA 96, section 261(c), emphasis added). In its Petition on Rehearing, SBC/Ameritech argues that this section somehow establishes a "necessary to further competition test" that must be applied when determining whether Project Pronto facilities must be unbundled. SBC/Ameritech is wrong. The Eighth Circuit has already addressed and settled this issue, finding that section 261(c) "applies only to those additional state requirements that are not promulgated pursuant to section 251 or any other section in Part II of the Act." Iowa Utilities Board v. FCC, 120 F.3d 753, 807 (8th Cir. 1997). In particular, the Eighth Circuit concluded that "[b]ecause subsection 251(d)(3) specifically governs state rules that "establish[] access and interconnection obligations of local exchange carriers," which is the heart of the subject matter of section 251, and subsection 261(b) governs state rules that are issued to 'fulfill[] the requirements of this part,' we conclude that the additional state requirements referenced in subsection 261(c) refer to separate state rules that do not directly pertain to the matters found in sections 251 through 261 (Part II) of the Act." Id. Moreover, section 261(c) applies only to "intrastate services" and, therefore, may not be used to impose requirements that implicate unbundled network elements.

B. The FCC's Collocation Order Is Consistent with the Commission's Ruling Regarding Line Card Collocation.

Section 251(c)(6) of the Act requires ILECs to provide, on a nondiscriminatory basis and at just and reasonable rates, physical collocation of equipment necessary for interconnection or access to unbundled network elements. The FCC issued its *Advanced Services Order* dealing

comprehensively with collocation issues in March of 1999. *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking (Mar. 31, 1999) ("*Advanced Services Order*"). The FCC determined that the pro-competitive provisions of the Act are technology-neutral and apply to advanced data services as well as to voice. *Id.* ¶ 15. Specifically, the Commission stated that competitive providers of advanced services must be allowed to collocate integrated equipment that would lower the cost of providing advanced services, and increase the range of services available to their customers. *Id.* ¶ 19. The Commission stated repeatedly in the *Advanced Services Order* that the standards it set forth were intended to serve only as a floor, and expressly reserved to state commissions the authority to resolve other issues not addressed in the order.

In the context of the *Advanced Services Order*, the FCC initially defined the term "necessary" in §251(c)(6) to mean "used and useful" for either interconnection or for access to UNEs. *Id.* ¶ 25. That interpretation of the statutory language, however, was rejected by the U.S. District Court in March, 2000, and the case was remanded to the FCC for further consideration of, among other things, its interpretation of what equipment is "necessary" for interconnection or access to UNEs in the context of the statute. The D.C. Court reiterated the requirement that an ILEC permit physical collocation of equipment that is "directly related to and thus necessary, required, or indispensable to 'interconnection or access to unbundled network elements.' " 205 F. 3d 424, 425.

On March 14, 2001, while the FCC was reconsidering its collocation rules, the Commission found that SBC/Ameritech's ADLU cards fit the definition of equipment necessary for the provision of advanced services. *Tariff Order* at 28. In doing so, the Commission made

clear that it was guided primarily by the basic principles of nondiscrimination set forth in 251(c)(6) and the pro-competitive technology- and service-neutral principles set forth in many FCC Orders, including the *Advanced Services Order*. *Id.* The Commission also articulated its interpretation of what is "necessary" in this context, finding that collocation of equipment is necessary so long as the equipment is "directly related to" interconnection and access to unbundled elements. *Tariff Order* at 29. Applying that standard to the facts in that proceeding, the Commission found that line cards met the necessary standard because: (1) line cards are the point of interconnection with NGDLC networks; (2) any inability to collocate such equipment would interfere with a CLEC's ability to compete effectively and efficiently with SBC/Ameritech and its advanced service affiliates; and (3) alternative collocation options may prove to be too expensive and inefficient for CLEC use. *Tariff Order*, at 29.

On July 12, 2001, the FCC adopted new collocation requirements for ILECs. While the FCC has not yet released the full text of its new collocation order, the FCC's press release indicated that its new collocation rules continue to permit a competitive carrier to lease space for its equipment at an ILEC's premises. FCC Press Release, FCC Approves Rules Designed to Give New Entrants Access to Incumbent Local Phone Companies' Networks (rel. July 12, 2001), at 1 (cited hereinafter as *FCC Press Release*). In particular, the FCC concluded that collocation of equipment is "necessary" for interconnection or access to unbundled network elements if an inability to deploy that equipment would preclude the requesting carrier from obtaining interconnection or access to unbundled network elements. *Id.* The FCC also indicated that multifunction equipment (equipment that provides functionalities in addition to interconnection and access to UNEs) meets this "necessary" standard only if the primary purpose and function of the equipment, as the requesting carrier seeks to deploy it, are to provide the requesting carrier

with "equal in quality" interconnection or "nondiscriminatory access" to one or more unbundled network elements. *Id.*

The FCC's "primary purpose and function" standard for collocation of multifunction equipment appears fully consistent with the Commission's "directly related to" standard set forth in the March 14, 2001, *Tariff Order*. Indeed, in its Press Release, the FCC indicated that "switching and routing equipment" typically meets its "necessary" standard because "an inability to deploy that equipment would, as a practical, economic, or operational matter, preclude a requesting carrier from obtaining nondiscriminatory access to an unbundled network element, the local loop." *FCC Press Release*, at 1. This statement is virtually identical to the Commission's application of the necessary standard to line card collocation. *Tariff Order*, at 29.

Having established that the "necessary" standard applied by the Commission in its March 14, 2001, is substantially similar, if not identical, to the standard articulated by the FCC, the application of the facts in this proceeding – which are no different than the facts established in the original proceeding – should compel the Commission to let its original decision stand regarding line card collocation.

There can be no doubt that the "primary purpose and function" of a line card, as the Joint CLECs seek to deploy it, are to provide Joint CLECs with "equal in quality" interconnection" or "nondiscriminatory access" to copper and fiber subloop components of Project Pronto. Rhythms has already cogently explained this point in its post-hearing briefs, Rhythms Hearing Br., at 36-37; Reply Br. at 33-34, and there are no facts in evidence in this proceeding that dispute its analysis. In particular, Rhythms explained that while a DSLAM occupies an entire shelf in a standard central office collocation rack, much of its functionality has been incorporated into a line card that can be inserted into the Next Generation Digital Loop Carrier ("NGDLC") chassis.

Rhythms Hearing Br., at 25-26. Line cards contain the electronics that generate and receive the data transmissions carried across the unbundled loop from the end user through the remote terminal and back to the central office, and thus establish the parameters of the advanced service that the carrier provisions to its customer. Line cards interconnected in this way thus substitute for a traditional DSLAM when a particular loop is served by a transmission facility that contains fiber optics. Collocating a line card with the NGDLC is the most efficient and effective means of interconnecting at the RT for those carriers that wish to do so.

Without the ability to collocate line cards in SBC/Ameritech NGDLC chassis at the remote terminal, requesting CLECs that wish to interconnect at the RT would not be able to compete efficiently and effectively in the provision of advanced services with SBC/Ameritech or its advanced services affiliate. First, because it may be impossible to place a central office style DSLAM in the tight quarters of an SBC/Ameritech remote terminal, due to either space exhaustion or economic infeasibility, CLECs must have the option of collocating electronic equipment in the remote terminal to perform the DSLAM functions between the fiber and copper subloop elements.

Second, because the speed of DSL service is directly proportional to the length of copper over which DSL is deployed, CLECs can only remain competitive by placing a line card in the NGDLC. If competitors instead must place a DSLAM at the SBC/Ameritech central office, SBC/Ameritech gains the advantage of providing DSL over a significantly shorter copper facility. *See generally* Section III.B, *infra.*

Third, if CLECs cannot place line cards in the NGDLC, they may be precluded from offering DSL over copper altogether, because DSL signals generated at RT locations can create significant levels of cross-talk. Rhythms' Rehearing Ex. 2.0 (Watson), at 16-17..

Finally, replicating SBC/Ameritech's facilities would require significant unnecessary expense. SBC is spending $6 billion dollars to upgrade its local loop architecture and to place electronic equipment in tens of thousands of remote locations throughout its 13-state region, thus extending its control over in the local telecommunications market into advanced services. *FCC Waiver Order*, at ¶ 4. In Illinois, SBC/Ameritech estimates that it would invest over $500 million and deploy approximately 2,100 NGDLCs. SBC/Ameritech Keown Rehearing Ex. 10-0, at 4-5. The FCC has, however, repeatedly rejected any requirement that would force CLECs to invest in duplicative facilities because it would delay market entry and postpone benefits to consumers. *See, e.g.*, *UNE Remand Order*, at ¶ 355; *First Report and Order*, at ¶ 378. SBC/Ameritech's strategy here is essentially to drain the capital resources of CLECs by forcing them into inefficient investment of capital, rather than permitting them to invest in a service-differentiated advanced service network. The Commission should reject SBC/Ameritech's anticompetitive strategy, just as it did in its *Tariff Order*. The Project Pronto architecture must remain open, as contemplated by the competitive network access mandated by the Act, rather than forcing CLECs to spend tens of billions of dollars to overlay these facilities.

C. Necessary and Impair Standard

TA 96 and the FCC's rules provide the legal framework for determining what network elements ILECs must make available to CLECs. SBC/Ameritech must offer CLECs unbundled access to SBC/Ameritech's networks elements if, at a minimum, such elements are a) necessary to a CLEC's ability to provide a competitive service; or b) lack of access to an element would impair a CLEC's ability to provide a competitive service. 47 U.S.C. § 251(d)(2). Under the FCC's detailed rules that it adopted in the *UNE Remand Order*, it is clear that Project Pronto meets the "necessary and impair" standard, and the Commission should uphold its decision requiring the components of Project Pronto to be offered as UNEs.

1. IMPAIR STANDARD IS APPLICABLE TO UNBUNDLING PROJECT PRONTO

All parties in this proceeding agree that the Project Pronto network elements at issue in this case are not proprietary. SBC/Ameritech Mr. Boyer admitted that its Project Pronto network elements are not "proprietary in nature." Rehearing Tr. (Boyer), at 965:4-7. The Joint CLECs have argued throughout this proceeding that Project Pronto elements are not proprietary. Rhythms' Watson Rehearing, Exh. 2.0, at 15-16. Accordingly, the Joint CLECs need only establish, and the Commission need only determine, whether Project Pronto meets the "impair" standard and must be unbundled pursuant to the "impair" standard.[16] Based on the testimony and substantial evidence submitted, in addition to the extensive cross-examination conducted during the seven days of hearing, it is clear that denying CLECs access to Project Pronto would impair CLECs' ability to provide competitive advanced services.

The "impair" standard as included in TA 96 and implemented in the FCC's rules requires ILECs to give unbundled access to a network element if lack of access "would merely limit a carrier's ability to provide the service it seeks to offer." Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, at ¶ 46 (rel. Nov. 5, 1999) (cited hereinafter as "*UNE Remand Order*"). More specifically, the FCC adopted a "materiality component" that provides for unbundling when there is a substantive difference between a CLEC utilizing a UNE or some alternative to offer a telecommunications service. *UNE Remand Order* at ¶ 51. In other words, if lack of access to Project Pronto network elements would materially diminish the value of xDSL services that CLECs could offer, their ability to provide such

[16] Because Ameritech has admitted in this proceeding that Project Pronto is not proprietary, the Joint CLECs submit that the "necessary" standard is completely inapplicable. However, if SBC/Ameritech should argue that the necessary standards is applicable, for brevity, the Joint CLECs each incorporate by reference their respective testimony, briefs, proposed HEPO, and exceptions to the HEPO from the case below.

services is "impaired." *UNE Remand Order* at ¶ 51. In making a "materiality" determination, the following factors must be considered: cost, timeliness, quality of available alternatives,[17] ubiquity, and operational factors. *UNE Remand Order* at ¶¶ 62-100. The Joint CLECs have submitted substantial evidence both in this proceeding and the case below demonstrating that under each of these factors is satisfied; thus, SBC/Ameritech is required to unbundle Project Pronto.

2. UNBUNDLING PROJECT PRONTO IS CONSISTENT WITH THE GOALS OF THE ACT.

Even if there were not overwhelming evidence that Project Pronto must be unbundled under the impair standard, the Commission still has authority to uphold its decision ordering such unbundling on an independent ground. The FCC has held that a determination of the "impair standard" pursuant to § 251(d)(2) is not dispositive of whether unbundling is required. *UNE Remand Order*, at ¶ 103; *See also*, ¶ 309. Pursuant to "the plain import of the 'at a minimum' language" in § 251(d)(2)" and in response to the U.S. Supreme Court's directive that the FCC should adopt "some limiting standard rationally related to the goals of the Act" when determining what elements should be unbundled, the FCC adopted an additional test that state Commissions may use in determining whether unbundling is required. *UNE Remand Order*, at ¶¶ 101, 103-104; 47 C.F.R. 51.317(b)(3). That test examines whether unbundling will result in "open[ing] local markets to competition and how access to a given network element will encourage the rapid introduction of local competition to the benefit of the greatest number of customers." *UNE Remand Order*, at ¶ 103. In doing so, the FCC expressly rejected SBC/Ameritech's and other ILECs' proposal that additional unbundling requirements could not

[17] The FCC noted that quality problems recognizable by the end-user customer may materially diminish a competitors ability to provide competitive services. *UNE Remand Order*, ¶ 64.

be adopted when the "necessary" or "impair" standards have been met. *UNE Remand* Order, at ¶ 103. The FCC directed that the following five factors be considered under this unbundling test:

- Rapid Introduction of Competition in All Markets;
- Promotion of Facilities-Based Competition, Investment, and Innovation;
- Reduced Regulation;
- Certainty in the Marketplace; and
- Administrative Practicality. 47 C.F.R. § 51.317(b)(3)

In response to Hearing Officer Squire's Rehearing Issue No. 2(B), if the Commission requires SBC/Ameritech to unbundle Project Pronto pursuant to the "impair" standard, it is not necessary for the Commission to conduct an analysis of the factors listed above. However, if the Commission determines that the impair standard is not met, then it may order unbundling of Project Pronto if the five factors listed above are met and would "open local markets to competition and how access to a given network element will encourage the rapid introduction of local competition to the benefit of the greatest number of customers." *UNE Remand Order*, at ¶ 104. As discussed in greater detail below, the Joint CLECs submit the evidence in this case amply demonstrates that all five factors are satisfied, and the Commission could uphold its decision requiring that Project Pronto be unbundled under this independent ground.

3. STATE COMMISSIONS HAVE THE LEGAL AUTHORITY TO REQUIRE ADDITIONAL UNES BEYOND THOSE THAT THE FCC ADOPTS.

Pursuant to both Illinois state law and TA 96, the Commission has the legal authority to adopt unbundled network elements beyond those that the FCC adopts. The Commission correctly exercised its authority when it ordered SBC/Ameritech to unbundle Project Pronto.

a. State Law

The Illinois Public Utilities Act ("PUA") explicitly authorizes the Commission to order the unbundling of additional network elements. Critical to this proceeding, the PUA grants the

Commission authority to adopt unbundling requirements that exceed those of the FCC. Specifically, PUA provides the following:

> A telecommunications carrier that provides both noncompetitive and competitive telecommunications services shall provide all noncompetitive telecommunications services on an unbundled basis to the same extent the Federal Communications Commission requires that carrier to unbundle the same services provided under its jurisdiction.
>
> The Illinois Commerce Commission *may require additional unbundling* of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act. (emphasis added). Sec. 13-505.6.

Accordingly, pursuant to Illinois state law, the Commission has explicit authority to order SBC/Ameritech to unbundle Project Pronto.

b. Federal Law

TA 96 provides for the FCC and state commissions each to have authority, often overlapping, to implement certain provisions of TA 96. Section 215(d) of TA 9, entitled "Implementation", charges the FCC with establishing regulations to implement the interconnection and access requirements of Section 215. The same section preserves state commission authority to act as well.[18]

In both its *First Report and Order* and in its more recent *UNE Remand Order*, the FCC has not only acknowledged state commissions' roles but has consistently supported state commissions that identify additional UNEs. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, Memorandum

[18] Section 215, provides the following: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B)is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part. Section 215 is codified as 47 U.S.C. 251(d)(3).

Decision and Order, CC Docket No. 96-98, FCC 96-325, at ¶ 136 (Aug. 8, 1996), *rev'd in part, Iowa Utilities Board v. FCC,* 120 F.3d (8th Cir., 1997*), rev'd in part, AT&T Corp. v. Iowa Utilities Board,* 119 S.Ct. 721, 1999 WL 24568 (1999) (cited hereinafter as "*First Report and Order*"). *UNE Remand Order*, at ¶¶ 15 (Executive Summary), 145, 153-154.

The FCC expressly reserved a role for the states to modify the national list, stating that ". . . section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order." *UNE Remand Order*, ¶ 154. Therefore, TA 96 and the FCC's rules grant the Commission clear authority to designate unbundled network elements beyond those that the FCC has adopted. The Commission should uphold its prior order requiring SBC/Ameritech to unbundle Project Pronto.

4. PROJECT PRONTO NETWORK ELEMENTS MUST BE OFFERED AS UNES

The clear weight of the evidence in this proceeding demonstrates that Project Pronto meets the "impair" standard and should be unbundled. Accordingly, the Joint CLECs recommend that the Commission unbundle the following network elements: the entire UNE loop from the customer NID to the central office; lit fiber subloops from the Optical Concentration Device ("OCD") to the RT (including PVPs and PVCs); a port on the OCD; the copper subloop from the RT to the SAI; the copper subloop from the RT to the customer NID; the copper subloop from the SAI to the customer NID; the NGDLC line card (which will be virtually collocated by the CLEC); and transport to the CLEC's network.

a. Project Pronto Meets The FCC's "Impair" Standard

All of the UNEs sought by the Joint CLECs In undertaking an "impair" analysis of the Project Pronto UNEs, the Commission must consider the following factors: cost, timeliness,

quality of available alternatives, ubiquity, and operational factors. *UNE Remand Order* at ¶¶ 62-100.

1) Cost

Cost assessment includes considering costs associated with alternatives, including the forward-looking costs of self-provisioning or purchasing, and fixed and sunk costs involved in self-provisioning. *UNE Remand Order*; ¶¶ 72-88. SBC/Ameritech claims that CLECs will not be impaired, but SBC/Ameritech witness Mr. Boyer admitted that the ILEC failed to consider the economics of whether CLECs would be impaired without access to Project Pronto UNEs. Rehearing Tr. (Boyer) at 968:8-22-969:1. However, in California this week, SBC's Chief Technology Officer, Ross Ireland, testified that it would not be economic for CLECs to attempt to build ubiquitous facilities to compete with SBC in California. See Attachment 1.

However, the economic effect on CLECs is essential to determining whether CLECs will be impaired. SBC is investing six billion dollars in Project Pronto over three years. Rhythms' Ireland Rehearing Cross, Exh. 1. In its plans to deploy Project Pronto in Illinois, SBC/Ameritech estimates it would have covered "101 wire center[s], each with a new Optical Concentration Device ("OCD"), deployed 2,100 Next Generation Digital Loop Carrier systems (NGDLCs), each with a price tag of approximately $200,000, and resulted in a capital investment of $519 million dollars. Ameritech's Keown Rehearing Exh. 10.0, at 4-5. Only an ILEC such as SBC/Ameritech would have the financial resources and savings to make such an investment in infrastructure. The only available alternative for CLECS, if access to the Project Pronto architecture were denied, would be self-provisioning. Carriers providing advanced services

provider simply do not have the financial resources to pour six billion dollars into developing advanced services network.[19]

Sprint provided testimony about the cost of collocating DSLAMs at all of the remote terminals deployed by SBC/Ameritech in Illinois. Sprint witness, Mr. Burt, testified that Sprint has spent at least $130,000 and months in attempting to collocate just one DSLAM at a remote terminal in Kansas. Sprint Rehearing Ex. 3.0 (Burt), at 23. Sprint now estimates that it will spend $133,519 to gain access to the loops from that one RT in Kansas. (Ameritech Rehearing Burt Cross Exh. 2, at 2). Using the number of RTs in Illinois, Sprint alone would have to spend an estimated $260 million to obtain access to the same loop architecture which SBC/Ameritech can access. Sprint Rehearing Ex. 3.0 (Burt), at 23.

Given the costs that Sprint has incurred to collocate at one RT and SBC/Ameritech's own estimates that a CLEC can expect to gain less than one customer per serving area interface (SAI), SBC/Ameritech's economist, Dr. Aron, was asked if such an investment would be a good investment for a CLEC to make. She responded, "that it would not be reasonable tom make that investment, no." Rehearing Tr. (Aron), at 1624-1625.

Even if a small percentage of SBC's vast resources were available to CLECs, they do not have the same expansive network in place as SBC/Ameritech and therefore do not ability to deploy their networks and services quickly and ubiquitously. Rhythms Rehearing Testimony 3.0 (Murray), at 47-48. The only reason that SBC can deploy loop facilities designed to bring DSL capability to at least 80% of the customers in its 13-state region for the relatively small sum of $6 billion is that the company already has in place ubiquitous distribution plant, supporting structure

[19] The FCC agreed with CLECs that "unbundled access to certain incumbents' network elements will accelerate initially competitors' development of alternative networks because it will allow them to acquire sufficient customers and the necessary market information to justify the construction of new facilities. (footnotes omitted). *UNE Remand Order*, at ¶ 112.

such as poles and conduit and numerous other facilities, including upgradeable Digital Loop Carrier ("DLC") RTs, that were built to provide narrowband telecommunications services to its monopoly basic exchange customers. Rhythms Rehearing Testimony 3.0 (Murray), at 48.

2) Timeliness

Beyond the sheer cost of building comparable facilities to offer advanced services, the substantial delays involved in a massive self-provisioning effort would preclude CLECs' ability to compete effectively. In California this week, S

BC's Chief Technology Officer, Ross Ireland, testified that it would likely take CLECs two to three years to construct ubiquitous facilities to reach all of advanced services customers in California. See Attachment 1. The FCC indicated that it was concerned about such delays in its impair analysis. *UNE Remand Order*, at ¶¶ 89, 91. The FCC directed that state Commissions should consider time lags associated with using alternatives in their impair analysis. In light of the rapidly changing advanced services market, the FCC found that "any delay" a competitive LEC experiences in provisioning service for the advanced services market can impair its ability to deliver services." *UNE Remand Order* ¶ 91. Moreover, the FCC concluded that incumbent LECs should not be able to delay entry by denying access to UNEs and "'lock-up' customers in advance of competitive entry." *UNE Remand Order*, ¶ 91 (footnotes omitted). That is precisely what has happened. In recent reports to the press and investors, SBC states that it has reached 1 million DSL lines in its 13 state region. That figure is many times over all CLECs providing DSL service combined. Accordingly, the time lag associated with self-provisioning is not a viable alternative to obtaining Project Pronto as UNEs.

In pre-filed testimony, Sprint witness Burt testified that it has taken Sprint 6-8 months to attempt to collocate a DSLAM at a SBC/Ameritech RT. Sprint Rehearing Ex. 3.0 (Burt), at 23. The evidence presented at the hearing now indicates that it has taken Sprint at least a year to turn

up service at the particular RT. Incredibly after being rejected by SBC/Ameritech for collocation in the RT because Sprint's DSLAM did not fit in the RT and rejected for adjacent collocation next to the RT because collocation space still was available in the RT (Rehearing Tr. (Welch), at 1515-1516), Sprint began the process for acquiring an easement from the property owner in early August 2000. . (Ameritech Rehearing Burt Cross Exh. 2, at 1). Sprint expects the construction of the engineered control splice so it can obtain access to the loops served by that RT to be finished in October, 2001. (Id.). Thus, it will take Sprint, in the one example where placing a DSLAM in the loop plant has been attempted, over a year to turn up service.

This type of timeline clearly harms CLECs in getting to the market to provide advanced services and demonstrates impairment. In fact, Mr. Ireland testified that a one year delay in rolling out Project Pronto would be very harmful to SBC/Ameritech in the marketplace. He acknowledged that a year delay for a CLEC in implementing a particular technology also would be a serious competitive harm for that CLEC. (Rehearing Tr. (Ireland), at 448-449). In sum, without unbundling Project Pronto, Joint CLECs clearly are impaired from a timing perspective.

3) Ubiquity

The FCC's impair analysis includes ubiquity as a factor when state Commissions determine whether a CLEC is impaired without access to UNEs. Specifically, the FCC directed that Commissions should consider the extent to which a competitive carrier can provide ubiquitous service using alternative facilities; ability to provide service may be impaired where lack of access to a UNE "materially restricts the number or geographic scope of the customers" a competitive carrier can serve. *UNE Remand Order* ¶ 97. Without access to Project Pronto, data CLECs cannot provide ubiquitous xDSL services; the inability to use the Project Pronto platform "materially restricts the number or geographic scope of the customers" a competitive carrier can serve. UNE Remand Order at ¶ 97. The provisioning of xDSL over home run copper is distance

sensitive, and generally cannot be supported on copper loops over 18,000 feet. Project Pronto extends the reach of xDSL by connecting copper subloops of no more than 12,000 feet (from the RT to the customer premises) to fiber subloops between the central office and the RT. The hybrid copper/fiber architecture of Project Pronto makes xDSL available to nearly **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXX ***END CONFIDENTIAL** of all SBC customers. Rhythms' Watson Rehearing Exh. 2.0P, at 19 (citing Rhythms Texas Exh. 63A (030629 to 030680), at Bates 030630). If denied access to Project Pronto, data CLECs will only be able to provide xDSL via line sharing to customers located within 18,000 feet of a central office. Rhythms' Watson Rehearing Exh. 2.0P, at 19.

Ubiquity is further inplicated by taking into the account the costs of collocating a DSLAM at a RT. As demonstrated above, given the large sums of money and time to complete the projects, CLECs will not be able to ubiquitously provide xDSL service using such arrangements. (Sprint Rehearing Ex. 3.0 (Burt), at 26-27).

Furthermore, Project Pronto is being deployed in large part to extend the reach of line-shared DSL *beyond* 18,000 feet of total loop length, and 18,000 feet is the maximum all-copper loop length on which line sharing can be achieved. Rhythms' Rehearing Exh. 2.0 (Watson), at 16. Thus, even if spare copper loops are available beyond 18,000 feet, they are irrelevant to line sharing. Furthermore, even for loops below 18,000 feet, DSL performance on all copper loops can be inferior to DSL performance on Project Pronto loops, because Project Pronto limits the copper segment distance to 12,000 feet, thereby obtaining higher data throughput rates. *Id.* In addition, there is a significant risk of throughput degradation for DSL services on all-copper loops after Project Pronto is deployed, because the generation of a strong DSL signal in the field at the RT can create significant levels of cross-talk. *Id.*; *See also,* Sprint Rehearing Ex. 5.0

(Dunbar), at 38). SBC/Ameritech supplied a document titled "Additional Noise Margin Ratio," which SBC claims addresses and resolves this issue. However, the Joint CLECs do not believe SBC's claim. As is shown in Exhibit DW-4 in Rhythms' Rehearing Exh. 2.1 (Watson), the T1E1.4 working group of ANSI Committee T-1 indicates that ADSL deployed in remote terminals is not spectrally compatible with existing home run copper based ADSL services. SBC-Ameritech's implementation of the additional noise margin ratio approach will not resolve the problems identified in Exhibit DW-4. Rhythms' Rehearing Exh. 2.1 (Watson), at 17.

4) Operational and technical factors

The FCC concluded that "material operational or technical differences in functionality that arise from use of alternative technologies may also impair a requesting carrier's ability to provide its desired services." *UNE Remand Order*, ¶ 99. The evidence in this case amply demonstrates that unbundling Project Pronto is technically feasible. In fact, SBC/Ameritech ordered its employees charged with developing UNEs to "roll out a product offering to the CLEC community that could be offered over the architecture." Rehearing Tr. (Boyer), at 863:4-6. When SBC first asked the FCC for a waiver from its Merger Conditions that would allow SBC to own the line cards in the NGDLC and the OCD, SBC provided a sample appendix to be added to CLEC interconnection agreements that offered Project Pronto as UNEs. Rhythms' Watson Rehearing Exh. 2.0, at 3; Letter from Paul K. Mancini, SBC Vice-President and Assistant General Counsel, to Lawrence Strickling, Common Carrier Bureau Chief, February 18, 1999. Moreover, SBC has also acknowledged its obligation to unbundle its Project Pronto architecture. Rhythms' Watson Rehearing, Exh. 2.0P, at 3 (citing Rhythms Texas Exh. 65A, (030306 to 030327), at Bates 030310). The above document states **BEGIN CONFIDENTIAL***** "XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXX."*****END CONFIDENTIAL**. Rhythms' Watson Rehearing Exh. 2.0P, at 3. (citing Rhythms Texas Exh. 65A, (030306 to 030327), at Bates 030310. It was only in April 2000, that Ameritech relabeled the Project Pronto offering from UNEs to an end-to-end service offering after SBC/Ameritech's "legal folks" and "higher ups" suddenly decided to change the name of Project Pronto from UNEs to a service while Mr. Boyer, SBC's project manager for Project Pronto, was on vacation. Rehearing Tr. (Boyer), at 887: 14-18. It is noteworthy that SBC's internal Marketing Service Descriptions continue to refer to Project Pronto **BEGIN CONFIDENTIAL***XXXXXXXXXXXXXXX**. *****END CONFIDENTIAL.** Regardless of the name, the evidence in this case (discussed in detail below) demonstrates that it is technically feasible for SBC/Ameritech to provide the network elements of Project Pronto as UNEs. Rehearing Tr. (Boyer), at 894:12-895:1; 904:10-17.

After careful consideration of all these factors in light of the substantial amount of evidence submitted in this rehearing phase, it is clear that denying CLECs access the Project Pronto network elements will impair CLECs' ability to provide competitive services.

b. The Commission Should Give No Weight To SBC/Ameritech's Broadband Service Offering As An Alternative To CLECs Having Access to Project Pronto UNEs.

SBC/Ameritech suggests that its Broadband Service is an "alternative" to offering Project Pronto UNEs and that such service is significantly different from a resale service. However, the FCC has previously rejected Ameritech's proposal and gives little weight to the offering of resale services as an alternative to UNEs. *UNE Remand Order*, at ¶ 67; *see* Sprint Rehearing Exh. 4.0 (Staihr), at 21. . Forcing CLECs to limit their DSL offerings solely to resale of SBC/Ameritech's broadband service would severely impair CLECs' ability to compete. *UNE Remand Order*, at ¶ 51.

The record in this proceeding demonstrates that SBC/Ameritech's Broadband Service is not a real alternative, even though SBC/Ameritech boasts of several "resale options" available to CLECs. Ameritech Boyer Rehearing Exh. 4.1 at 33. First, the Broadband Service does not provide the same level of technical features and flexibility as would Project Pronto UNEs. Rhythms' Watson Rehearing, Exh. 2.0, at 20. Second, SBC/Ameritech's Broadband Service is limited to ADSL only, whereas CLECs, including Rhythms, currently offers other types of xDSL that can be line shared. Third, the resale "options" do not provide CLECs the ability to offer the full range of line-shared xDSL capabilities, such as voice or video over xDSL, to Illinois consumers. Rhythms' Watson Rehearing Exh. 2.0, at 21. Fourth, if forced to resell SBC/Ameritech's Broadband Service, CLECs will be unable to add new features and functions that SBC/Ameritech chooses not to offer. Rhythms' Watson Rehearing Exh. 2.0 at 11. SBC/Ameritech is the sole gatekeeper determining what features and capabilities it will deploy, regardless of any collaborative sessions it holds with CLECs pursuant to the FCC's merger conditions. Rehearing Tr. (Boyer) 1002:9-12.

Furthermore, SBC/Ameritech's Broadband Service is a limited time offer with a set expiration date in three years. Ameritech Ireland Rehearing Exh. 1.1 at 11. SBC/Ameritech's senior executive, Mr. Ireland, steadfastly insisted that he would not commit to offer the Broadband Service beyond three years, nor to use TELRIC pricing for services provided on the Project Pronto architecture. Rehearing Tr. (Ireland), at 359:16-20. Although Mr. Ireland admitted that it would not be a good thing for CLECs "to go over the cliff" after three years and one day, Mr. Ireland refused to commit to offer CLECs any option for providing advanced services other than building their own networks once the Broadband Service is withdrawn.

CLECs cannot build a business plan on a service that SBC/Ameritech can simply make disappear after three years. In its unbundling analysis, this is the very problem that the FCC sought to prevent. *UNE Remand Order*, ¶ 114.

Moreover, as the Broadband Service Offering was worded in Ms. Chapman's Exhibit, CAC-4 in the case below, SBC/Ameritech granted itself the "right to change, modify and or withdraw the BBS, in its sole discretion, in whole or in part, as a result of regulatory developments, including but not limited to action or inaction on matters pending before the FCC of the State of Illinois." Sprint Burt Rehearing Ex. 3.0, at 9. Given the broad scope of the language and the uncertainty it causes, Mr. Burt testified that CLECs cannot possibly base a business case on using the Broadband Service offering. (Id.) While Mr. Ireland attempts to downplay the broad discretion that SBC/Ameritech gives itself in the Broadband Service Agreement, SBC/Ameritech clearly wants the ability to not price the offering at TELRIC rates after the three year period expires. Rehearing Tr. (Ireland), at 451. The implications on any CLEC offering the Broadband Service at that time obviously are negative given that a CLECs cost structure could be increased substantially at SBC/Ameritech's sole discretion without any opportunity for Commission review.

Because the Broadband Service Offering is nothing more than a resale of Ameritech's service, there will be little chance for a CLEC to differentiate its offering from the retail Internet product offered by the Ameritech affiliate. For example, SBC/Ameritech has chosen not to enable all of the ATM Quality of Service ("QoS") classes that the Litespan can support. The lack of QoS options means that CLECs cannot provide innovative services such as voice and video over DSL. As Mr. Crandall, SBC/Ameritech's own economic expert testified, differentiation is essential to a CLEC's ability to survive. Rehearing Tr. (Crandall), at 607:20-

608:7. Finally, by offering Project Pronto as a service, rather than a UNE, SBC/Ameritech can effectively deny CLECs benefits and protections granted under §§ 251 and 252. Duty to negotiate in good faith and TELRIC pricing are just two examples. 47 U.S.C. §252(d), 252(e)(6). SBC has explicitly stated that it will object to any § 251/252 arbitration for terms and conditions of the Broadband Service. Rhythms Watson Rehearing Exh. 2.0 at 15 (citing Rhythms Texas Exh. 51 (037159 to 037172), at Bates 037164). However, such arbitrations guarantee CLECs state assistance in establishing and enforcing non-discriminatory just and reasonable rates, terms and conditions for UNEs and interconnection access.

c. The Commission Should Give No Weight to the collocation of DSLAM at the Remote Terminal as a ubiquitous, cost effective option to unbundling Project Pronto.

SBC/Ameritech claims that CLECs are not impaired if it does not unbundle Project Pronto as a UNE because CLECs can collocate DSLAMs at remote terminals and provide advanced services using subloops. A simple review of (i) the available space at remote terminals, (ii) technical considerations associated with SBC/Ameritech's remote collocation proposal and (iii) the economics of SBC/Ameritech's remote collocation proposal clearly demonstrates that neither the CLECs' need for access to their customers nor consumers' interest in competition can be satisfied simply by instructing SBC/Ameritech to permit CLECs to collocate at the remote terminal to access subloops or dark fiber. The UNE Remand factors of timeliness, cost, ubiquity, and rapid introduction of competition are all implicated when considering the SBC/Ameritech remote collocation of DSLAMs option.

Both the FCC and this Commission have already found that CLEC collocation of DSLAMs is problematic. The FCC has indicated: "[a]ll indications are that fiber deployment by incumbent LECs is increasing, and that collocation by competitive LECs at remote terminal is

likely to be costly, time consuming, and often unavailable."[22/] Similarly, this Commission has found that RT collocation "is limited by space constraints, is quite expensive (and may be uneconomic in many or most RT locations), and takes considerable time to deploy. *Tariff* Order, at 23.

Even if SBC/Ameritech could make remote terminal space available for collocation on a mass-market basis, the fact that SBC/Ameritech's proposed form of RT collocation (coupled with subloop access) is economically unsustainable. Experience has shown that competitive LEC collocation at the central office requires a formidable commitment,[23/] but at least the cost of collocation in such centralized locations can be spread over the entire universe of customers in that office that a competitive LEC might expect to win. Although the costs of collocation at an individual remote terminal may be marginally smaller than those of collocating at the central office, the universe of potential customers is significantly smaller (and the number of necessary collocations significantly larger), so that the per-customer cost is vastly higher.

The costs of SBC/Ameritech's RT collocation proposal are certainly excessive. Specifically, uncontroverted evidence indicates that Ameritech hardwired its equipment at the RT, which precludes any reasonable CLEC access to subloops at the RT even though vendors manufacture RTs with cross-connect functions that allow access to subloops. As a result, CLECs will be forced to pay for a work-around or to build adjacent collocation space. As a result, Sprint estimated in prefiled testimony that it will cost approximately $130,000 for adjacent collocation at a remote terminal, and take approximately 6-8 months to complete the installation and begin

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22/ *Line Sharing Reconsideration Order*, at ¶ 13. *See Rhythms/Covad Arb. Rehearing Award*, at 32 ("Further, the high cost of collocation and crowded conditions in RTs often make collocation unavailable").

23/ *See UNE Remand Order*, at ¶¶ 262-266 (finding that collocating in incumbent LEC central offices imposes material costs and delays on a requesting carrier and materially diminishes a requesting carrier's ability to self-provision circuit switches to serve residential and small business customers).

services. Sprint Burt Rehearing Ex. 3.0, at 23. Sprint has updated its projections , and it will take Sprint more than a year to begin offering service at that site and cost $133,519. Ameritech Burt Rehearing Cross Exh. 2. Given that Ameritech has estimated that its Illinois plans included NGDLC deployment at approximately 2100 remote sites, SBC/Ameritech Keown Rehearing Ex. 10.0, at 4-5, it would take a carrier like Sprint over $270 million just to collocate at each of these locations. The cost of this collocation is prohibitive and materially impairs a CLEC's ability to provide xDSL-based services in Illinois. Moreover, delays of 6-12 months can significantly impair a CLEC's ability to compete for customers in the Illinois marketplace.

The Commission also must disregard Dr. Aron's less than rigorous analysis that it is reasonable for CLECs to spend approximately $130,000 in collocating a DSLAM at a RT. Using a study released by Lehman Brothers on March 9, 2001, Dr. Aron explains that cable companies have spent on average $372 per home passed to upgrade their systems to be cable modem ready.[24] SBC/Ameritech Rehearing Exh.8.1 (Aron), at 12. Using the $130,000 collocation figure supplied by Sprint, Dr. Aron calculates that Sprint is spending between $43 and $216 per home passed. (Id.) Of course, Dr. Aron's analysis is not a true apples to apples comparison of the costs facing a CLEC in comparison to a cable company's costs. Dr. Aron omits: (1) the non-recurring and recurring charges of all of the loops served by the particular RT; (2) transport costs from the RT to the central office; (3) an ATM switch to transport the traffic to the ATM network; and (4) customer acquisition, marketing and back-office investments. (Rehearing Tr. (Aron), at 1610-1616). Dr. Aron also does not take consider that the cable company has 70-80% market share of the homes that it is passing in upgrading its plant and the CLEC has little or no embedded market share when it installs a DSLAM at the remote terminal.

[24].

(Id. 1617-1618). In sum, the cable company to CLEC collocation of a DSLAM at the RT comparison conducted by Dr. Aron fails in many respects. Curiously, Dr. Aron introduced the cable company upgrade numbers into the debate even though there SBC/Ameritech's own per customer passed upgrade to Project Pronto number is in the record. SBC/Ameritech's business case documents state that the Project Pronto upgrade will cost it ***Begin Confidential XXXX ***End Confidential per customer location passed. We can only assume that Dr. Aron used the cable upgrade numbers to compare to the alleged CLEC investment because the cable investment is almost ***Begin Confidential XXXXXX ***End Confidential times SBC/Ameritech's Project Pronto investment.

While Dr. Aron relies on the cable upgrade number from the Lehman Brothers report, she conveniently omits a statement therein that is pertinent to these proceedings. In addition to discussing cable companies plant upgrades, the report discusses RBOC network upgrades and makes the following comment. "At the end of 2000, we estimate the RBOCs have upgraded 46 million homes or 45 percent of their addressable market. The rate of deployment of remote terminals will determine the pace of the remaining upgrade. **However, the RBOCs also must provide access to these remote terminals on an unbundled basis to CLECs**." (Rehearing Tr. (Aron), at 1626 (emphasis added). When asked about this statement, Dr. Aron only could offer that analysts who write these reports do not understand the word "unbundled" in the regulatory sense even though she admitted that she has no direct knowledge of the understanding of the analyst who wrote the report she relies upon. (Id. at 1627).

Because of the excessive cost, time to market, uncertainty in knowing if collocation space and dark fiber facilities are available, and the inability of CLECs to replicate SBC/Ameritech's network for advanced services by collocating DSLAMs at (or adjacent to) the RT, this option

does not alleviate the material impairment that CLECs will incur if Project Pronto is not unbundled.

d. Unbundling Project Pronto is consistent with the pro-competitive goals of TA 96.

The Commission has the authority and a complete record in this proceeding to order SBC/Ameritech to unbundle its Project Pronto. Yet, if the Commission does not order unbundling pursuant to the "impair" standard, the Joint CLECs submit that the Commission can unbundle Project Pronto under an analysis pursuant to 47 C.F.R. § 51.317(b)(3). Given the evidence in this record, such analysis must conclude that unbundling of Project Pronto is consistent with TA 96 and therefore, required.

The Joint CLECs address each factor in 47 C.F.R. 51.317(b)(3) below.

- Rapid Introduction of Competition in All Markets

The Joint CLECs submit that the unbundling of Project Pronto will accelerate the rapid introduction of competition for many xDSL services in all markets in Illinois. Without access to Project Pronto, data CLECs cannot provide ubiquitous xDSL services. Rhythms Watson Rehearing Exh. 2.0, at 8-19. Lacking the ability to provide ubiquitous services, CLECs will not be able to compete with SBC/Ameritech. Competition will certainly diminish and ultimately cripple customer choice in the advanced services marketplace. While SBC/Ameritech make perceive a market advantage in restricting CLECs' offerings to the same speeds, features and functions that SBC/Ameritech elects to offer, such outcome is not consistent with TA 96. Unbundling Project Pronto will allow CLECs to develop and deploy various types of xDSL, as well as voice and video over xDSL. *See,* Ameritech Boyer Cross, Exh. 4.0, at 32; Rhythms' Watson Rehearing, Exh. 2.0, at 13. Failure to unbundle, will result in the status quo: various

speeds of one type of DSL technology without the capability to support new features such as voice and video over DSL.

Moreover, and contrary to SBC/Ameritech's claims, Project Pronto's configuration will substantially alter the technical characteristics of a large number of loops that CLECs require to provide xDSL services via line sharing. *See* Ameritech Ireland Rehearing Exh. 1.0, at 25. Not only will the new architecture require CLECs to utilize loops with newly deployed fiber, but it may also affect CLECs ability to continue using copper loops. Further, the option to continue using home run copper after Project Pronto may not be viable due to cross talk problems created by the card-based DSLAMs at the RT. Rhythms' Rehearing Exh. 2.1 (Watson), at 16. Without access to copper loops or the unbundled Project Pronto UNEs, the goal of TA 96 for the "rapid introduction of competition in all markets" will simply not exist.

- Promotion of Facilities-Based Competition, Investment, and Innovation

As SBC/Ameritech's own economist, Dr. Levin, stated, "Facilities-based competition takes time." (SBC/Ameritech Rehearing Exh. 11.1 (Levin), at 10. To that end, the FCC agreed with CLECs that unbundling will initially "accelerate competitors' development of alternative networks because it will allow them to acquire sufficient customers and the necessary market information to justify the construction of new facilities." *UNE Remand Order*, ¶ 113 (footnotes omitted). Further, in its *Line Sharing Order*, the FCC found that CLECs "have premised innovative marketing arrangements upon the presence of a line sharing requirement" which of course, promotes innovation.[25] *Line Sharing Order*, ¶ 52. SBC/Ameritech wants to thwart that potential by limiting what CLECs may have access to and thereby what they may offer in the marketplace.

[25] *Line Sharing Order*, ¶ 52. The FCC also recognized that CLECs should have access to "elements they need to ramp up towards facilities deployment." *Id.* at ¶ 111.

- Reduced Regulation;

SBC/Ameritech argues that unbundling will not reduce regulation because it will "nearly double the prior list of all UNEs." Ameritech Boyer Rehearing Exh. 4.0, at 54. The number of unbundled UNEs to which SBC/Ameritech must provide access is irrelevant. To reduce the implementation of regulation, SBC/Ameritech should simply adhere to the FCC's decision that requires incumbents to offer loops and subloops generally and access to the HFPL in particular as UNEs. Simply put, once SBC/Ameritech begins providing the UNEs as ordered by the Commission and the FCC, litigation and other regulatory proceedings will reduce substantially.

- Certainty in the Marketplace

The FCC's analysis of the "certainty in the marketplace" focused on providing CLECs, and not Ameritech, certainty in the marketplace for purposes of obtaining the necessary financial capital or expansion.[26] *UNE Remand Order*, at ¶ 115.[27] Unbundling Project Pronto is essential for CLECs to execute their business plans. For example, SBC/Ameritech can pull the Broadband Service Offering after three years or change its terms unilaterally. Utilizing Project Pronto UNEs in conjunction with their own facilities, will permit CLECs to develop a customer base and their network as intended by TA 96 and the FCC's and the Commission's rules.

- Administrative Practicality.

The Commission should consider whether the unbundling Project Pronto would be administratively practical to apply. *UNE Remand Order*, at ¶ 116. SBC/Ameritech suggests that

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[26] SBC/Ameritech's suggestion that it has faced undue uncertainty regarding the unbundling of Project Pronto is not only misplaced but insulting. The Arbitration Order that the Commission issued in the Covad/Rhythms interconnection agreement arbitration was very certain. As was the FCC's *Line Sharing Order*. Had SBC/Ameritech simply adhered to those orders, not only would it have the certainty it now allegedly seeks, but it also would have saved itself, this Commission and CLECs from expending "vast amounts of time and resources, ultimately impairing the ability of competitive LECs to execute their business plans" as the FCC sought to preclude. *UNE Remand Order*, ¶ at 115.

[27] Upon adopting unbundling requirements, the FCC stated it "should typically provide the uniformity and predictability new entrants and fledgling competitors need to develop and implement national and regional business plans." UNE Remand Order, ¶ 115.

unbundling Project Pronto is "novel" and "complex," which is apparently the standard ILEC response when CLECs seek the features and capabilities they need to support innovative new services. Unbundling Project Pronto is neither novel nor technically infeasible. Rhythms Watson Rehearing Exh. 2.0, at 3-4. Moreover, SBC/Ameritech has acknowledged its obligation to unbundle its Project Pronto architecture, as discussed in greater detail in Subsection (b) above.

Yet, for reasons that have nothing to do with novelty or technicality, SBC/Ameritech has simply refused to fully comply with the Commission and the FCC's orders. In fact, when questioned on its efforts to address the operational issues resulting from the Commission's orders in the Covad/Rhythms arbitration proceeding and the decision in the lower case, SBC/Ameritech could not confirm that it made an effort to implement the Commission's order. Instead, SBC/Ameritech's witness Ross Ireland, CTO for SBC's entire 13-state region, stated "to some degree I [SBC/Ameritech] expect we did" address issues. Finally, SBC/Ameritech's position in this docket seems like a concerted effort to back out of its commitments to the FCC, rather than a reaction to the Commission's creation of "more regulatory uncertainty," or any other impediment to the company's efficient deployment of new technology. Rhythms Rehearing Exh. 3.0 (Murray), at 62. For all of the reasons stated above, SBC/Ameritech's Project Pronto meets the FCC's "impair" standard and must be unbundled. Further, even if Project Pronto did not meet the FCC's "impair" standard, the Commission has full authority, and the record in this proceeding demonstrates, that Project Pronto should be unbundled under 47 C.F.R. § 51.317(b)(3) to support the goals of TA 96 to foster market entry by CLECs.

D. SBC/Ameritech's claim that the Project Pronto architecture contains packet switching that the FCC has determined is not available as a UNE is not credible.

SBC/Ameritech argues that the Commission erred when it required SBC/Ameritech to support CLEC access to line sharing as a UNE from the customer location to the central office,

either on an end-to-end basis, or through the unbundling of various subloop elements. *Tariff Order,* at 22-25. In particular, SBC/Ameritech claims that it should not be required to unbundle Project Pronto because the architecture contains "so-called" packet switching that the FCC has determined is not available as a UNE, absent certain conditions. As explained below in further detail, SBC/Ameritech's claim is incorrect for the following reasons:

- The Joint CLECs are not asking for unbundled packet switching. Rather, they seek unbundled access to line sharing over hybrid fiber-copper loops that they are entitled to pursuant to the FCC's *Line Sharing Reconsideration Order*.

- Even if the Commission finds that the Joint CLECs are seeking packet switching when they request unbundled access to line sharing over Project Pronto,[28] the Commission should still require unbundling of these capabilities in all circumstances where SBC/Ameritech has deployed Project Pronto, pursuant to the unbundling criteria set forth in the *UNE Remand Order*.

- Even if the Commission finds that one of more of the *UNE Remand Order* unbundling criteria is not met, it has the authority to order the unbundling of the "packet switching" functionality of Project Pronto.

1. The Joint CLECs are seeking unbundled access to line sharing over Project Pronto, not packet switching.

As a threshold matter, it is important to note that the Joint CLECs are not asking for unbundled packet switching in this proceeding. Rather, the Joint CLECs are seeking unbundled access to line sharing over hybrid-copper loops, either on an end-to-end basis or via the unbundled elements set forth in the *Tariff Order*. As noted in Section III.A., and as recognized by this Commission (*Tariff Order,* at 24-25), the recent release of the FCC's *Line Sharing Reconsideration Order* has already settled this matter in favor of the Joint CLECs. As discussed above, in that Order, the FCC held that:

[28] For reasons set forth in detail in AT&T Starkey's testimony, AT&T maintains that the ADLU card and OCD provide transmission functionality, not packet switching. AT&T/WorldCom Starkey Rehearing Exh. 1.0., at 10, 37.

> [T]he requirement to provide line sharing applies to the entire loop, even where the incumbent has deployed fiber in the loop (e.g., where the loop is served by a remote terminal). Our use of the work "copper" in section 51.319(h)(1) was not intended to limit an incumbent LEC's obligation to provide competitive LECs with access to the fiber portion of a DLC loop for the provision of line-shared xDSL services. As noted above, incumbent LECs are required to unbundle the high frequency portion of the local loop where the incumbent LECs voice customer is served by DLC facilities. . . .
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> * * *
>
> In the absence of this clarification, a competitive LEC might undertake to collocate a DSLAM in an incumbent's central office to provide line-shared xDSL services to customers, only to be told by the incumbent that it was migrating those customers to fiber-fed facilities and the competitor would now have to collocate another DSLAM at a remote terminal in order to continue providing line-shared services to those same customers. If our conclusion in the *Line Sharing Order* that incumbents must provide access to the high frequency portion of the loop at the remote terminal as well as the central office is to have any meaning, then competitive LECs must have the option to access the loop at either location, not the one that the incumbent chooses as a result of network upgrades entirely at its own control. . . . *Line Sharing Reconsideration Order*, at ¶¶ 10-11.

Indeed, the FCC issued its *Line Sharing Reconsideration Order* to ensure that "increased deployment of fiber-based networks by incumbent LECs [do not] unduly inhibit the competitive provision of xDSL services. *Id*. at ¶ 13. Accordingly, as this Commission recognized, SBC/Ameritech clearly now has the obligation to permit access to line sharing even over the Pronto architecture, and cannot attempt to rely on its policy argument that line sharing is only required over copper loops. *Tariff Order*, at 24-25.

2. The FCC's order regarding unbundling of packet switching does not preclude unbundling Project Pronto network elements.

Even if the Commission finds that the Project Pronto architecture deployed by SBC/Ameritech contains packet switching, the FCC requires ILECs to unbundle packet switching where the following conditions are satisfied:

> (i) The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);
>
> (ii) There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to offer;
>
> (iii) The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and
>
> (iv) The incumbent LEC has deployed packet switching capability for its own use.[29]

Examination of the record evidence reveals that, contrary to SBC/Ameritech's assertions; these criteria have been satisfied when SBC/Ameritech deploys Project Pronto in Illinois. This Commission has already analyzed the four packet switching criteria and found that the "evidence demonstrates that all four criteria are satisfied and it is permissible to make the OCD . . . available as a UNE." *See Rhythms/Covad Arb. Rehearing Award*, at 32. For the reasons set forth below, that same analysis applies to the ADLU card. Even under the standards of the *UNE Remand Order*, the unbundling of SBC/Ameritech's "packet switching" components must be required in all circumstances where SBC/Ameritech has deployed DSL services over Project

[29] 47 C.F.R. § 51.319(c)(5); *UNE Remand Order* ¶ 313.

Pronto. This is exactly the determination reached by the Texas Arbitrator after reviewing a virtually identical fact pattern. *Texas Arbitration Award*, at 75-80. Paragraph 313 of the *UNE Remand Order* simply provides no basis to deny CLECs access to Project Pronto UNEs.

The first FCC criterion -- that an ILEC actually deploy a DLC system or introduce fiber into the distribution plant -- is obviously met. There is no question that SBC/Ameritech is deploying NGDLC carriers throughout its Illinois network. Based on SBC's filings, the FCC characterized Project Pronto as relying in "large part upon the increased use of Digital Loop Carrier (DLC) systems to reduce overall costs." *FCC Waiver Order*, at ¶ 4. SBC/Ameritech's witnesses testified that the Company's Project Pronto efforts will result in the deployment of NGDLCs to reduce loop length and network condition limitations that will enable SBC/Ameritech to offer DSL services to over 20% more customers than it could previously reach in its Illinois service territory. Rehearing Tr. (Boyer), at 949:1 - 950:12. Thus, the FCC's first criterion of the packet switching rule has been satisfied.

The second FCC prerequisite to the unbundling of "packet switching capability" is the lack of spare copper facilities that are "capable of supporting the xDSL services the requesting carrier seeks to offer,"[30] and that permit the CLECs to offer "the same level of quality for advanced services" as that offered by the ILEC (or its data affiliate). *UNE Remand Order*, at ¶ 313. SBC/Ameritech argues that the second FCC prerequisite for requiring unbundled access to packet switching, (*i.e.*, that "no spare copper loops" are available) will not be met because all-copper loops will often be available to the CLECs. SBC/Ameritech is wrong.

As noted above, SBC/Ameritech's "all-copper" loop alternative is neither ubiquitous nor permanent. SBC/Ameritech has acknowledged that the purpose of Project Pronto is to overcome

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30 *UNE Remand Order*, at Appendix C (citing current 47 C.F.R. § 51.317(c)(5)(ii)).

loop length issues that result from the traditional copper loop network. SBC/Ameritech Boyer Rehearing Exh. 4.0 at 5:23-6:6. With Project Pronto, loop lengths are shortened to 12,000 feet or less, Rehearing Tr. (Boyer), at 947-950, 954, which allows SBC to offer broadband xDSL services to 20 million additional customers. *See FCC Waiver Order* ¶ 4. In contrast, CLECs are permanently foreclosed from providing DSL services to these customers using SBC/Ameritech's all-copper loop alternative because of excessive loop lengths or other network conditions. Rehearing Tr. (Boyer), at 936-40. Similarly, in new areas of growth where only Project Pronto is deployed, there is no guarantee that CLECs will be able to access "all-copper" loops. Also, there is no assurance that all-copper loops will be preserved and maintained indefinitely. Rehearing Tr. (Boyer), at 998-1000; (Ireland) at 473.

In addition, the mere availability of an all-copper loop -- instead of the upgraded loops that are available to SBC/Ameritech and its affiliate -- does not discharge SBC/Ameritech's unbundling obligations associated with its Project Pronto architecture. As noted above, the physical characteristics of spare copper will almost never enable a competitive LEC to match the service capabilities that SBC/Ameritech (and its affiliate) are able to offer over its upgraded loop architecture. AT&T/WorldCom Starkey Rehearing Exh. 1.0, at 18:449-465. Thus, the mere availability of spare copper will not discharge SBC/Ameritech's unbundling obligation, because competitive LECs will not be able to use those facilities to "support[] xDSL services the requesting carrier seeks to offer," *i.e.*, at least the same services that the ILEC and its affiliate can make available to the same customer. *See* 47 C.F.R. § 51.317(c)(5)(ii).

The FCC's third criterion provides that an "incumbent will be relieved of [its] unbundling [packet switching] obligation only if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM.

UNE Remand Order, at ¶ 313; *see also* 47 C.F.R. § 51.317(c)(5)(iii). The FCC also notes that ILECs "may not unreasonably limit the deployment of alternative technologies when requesting carriers seek to collocate their own DSLAMs in the remote terminal." *UNE Remand Order*, at ¶ 313.

The record evidence in this proceeding demonstrates that SBC/Ameritech cannot satisfy this criterion. The FCC has found that the ADLU card is "an indispensable component for providing ADSL service through the manufacturer's NGDLC system." *FCC Waiver Order*, at ¶ 14, and n.34. SBC/Ameritech concedes that it does not permit requesting carriers to physically or virtually collocate line cards, which serve as the functional equivalent of a DSLAM, although it is technically feasible to do so. Rehearing Tr. (Keown) at 2033:7-2034:21.

Moreover, uncontroverted evidence indicates that SBC/Ameritech's decision to hardwire its equipment at the RT precludes any reasonable CLEC access to subloops at the RT even though vendors manufacture RTs with cross-connect functions that allow access to subloops. As a result, CLECs are forced to pay for a work-around or to build adjacent collocation space. As a result, a CLEC may have to pay per remote terminal for access to the subloop.

Finally, even if one does not consider the virtual collocation of line cards, collocation of DSLAM equipment is fraught with problems and inefficiencies, as detailed above. Indeed, both the FCC and this Commission have already found that CLEC collocation of DSLAMs is problematic. The FCC has indicated: "[a]ll indications are that fiber deployment by incumbent LECs is increasing, and that collocation by competitive LECs at remote terminal is likely to be costly, time consuming, and often unavailable." *Line Sharing Reconsideration Order*, at ¶ 13. Similarly, this Commission has found that RT collocation "is limited by space constraints, is quite expensive (and may be uneconomic in many or most RT locations), and takes considerable

time to deploy.[31] *Tariff Order, at 23. See also Rhythms/Covad Arb. Rehearing Award,* at 32 ("Further, the high cost of collocation and crowded conditions in RTs often make collocation unavailable"). Accordingly, Ameritech/SBC's remote terminal alternatives cannot satisfy the third condition of the FCC's *UNE Remand Order*.

SBC/Ameritech argues that it does not meet the fourth criterion for unbundled "packet switching" -- that the "incumbent LEC has deployed packet switching capability for its own use." In particular, SBC/Ameritech claims that this condition does not apply to Project Pronto because the packet switching will not be for SBC/Ameritech's use but "only for CLECs' use."

This Commission has already addressed the absurdity of this position and has determined that Project Pronto is being deployed for SBC/Ameritech's own use: "[t]here is substantial evidence on the record that SBC, Ameritech IL's parent is deploying Project Pronto for its own financial benefit, both in terms of cost savings and deployment of the advanced services market." *Rhythms/Covad Arb. Rehearing Award,* at 32.[32] The record evidence in this proceeding calls for a similar determination. Substantial unrebutted evidence in this case demonstrates that SBC is deploying Project Pronto solely for its own benefit and explicitly because it believes that it can achieve substantial cost savings and profits by doing so. For example, SBC has described Project Pronto as "an unprecedented, $6 billion initiative . . . to transform the company . . . into the largest single provider of advanced broadband services in America,"[33] and it has told

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31 For these reasons, AT&T contends that, even if CLECs are permitted a virtual collocation option at the remote terminal -- which they are entitled under the FCC's collocation rules -- subloop unbundling cannot provide a commercially reasonable substitute for unbundled access to Project Pronto network elements. AT&T/WorldCom Starkey Rehearing Exh. 1-0, at 10, 37.

32 More recently, this Commission (*Tariff Order,* at 23) noted the possibility that SBC/Ameritech's separate affiliate "may soon be subsumed into [SBC/]Ameritech . . . ."

33 SBC Press Release, SBC Launches $6 Billion Initiative to Transform it Into America's Largest Single Broadband Provider, (Oct. 18, 1999) ("SBC Pronto Press Release").

investors it expects Project Pronto to generate $3.5 billion in new annual revenues by 2004.[34] SBC Chairman Edward Whitacre has boasted that, once Project Pronto is completed, "*only SBC will have all the pieces*" needed to provide the range of services that consumers want and expect.[35] Nowhere in SBC's announcement of Project Pronto did it claim or imply that the project was undertaken "only for CLECs' use," as SBC/Ameritech' s revision of history now claims.

SBC/Ameritech may be relying on the fact that xDSL services will not be provided by SBC/Ameritech but by its data affiliate. Clearly, SBC/Ameritech proposes to use Project Pronto even if only to provide service to its new affiliate. Any such argument that the fourth condition of the FCC's unbundling criteria remains unsatisfied because xDSL services will not be provided by SBC/Ameritech but by its affiliate is meritless, however. SBC/Ameritech's argument would necessarily rest on precisely the conduct ruled unlawful by the D.C. Circuit in *ASCENT* -- the use of an affiliate to avoid section 251(c) obligations. As the *ASCENT* court made clear, data affiliates of incumbent LECs are subject to all obligations of section 251(c)(3) of the Act.[36] Similarly, the FCC recently concluded, in light of the *ASCENT* decision, that an ILEC's 251(c)

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34 SBC Investor Briefing No. 223, SBC Reports Strong Revenue and Earnings Growth for Fourth Quarter, Full-Year 1999, (Jan. 25, 2000), at 3.

35 *Id*., at 4 (quoting Whitacre) (emphasis added). Whitacre explained, "by converting the 'last mile' into a high speed 'first mile' on ramp to the Internet, we are making nearly all of our 60 million access lines more powerful for customers and more valuable to shareholders . . . . Project Pronto together with our expanding service footprint and plans to provide long distance service, is an integral part of our plan to be a full service, global provider and the only communications company our customers need." *Id.* at 2.

36 *Association of Communications Enterprises v. FCC*, 235 F. 3d 662 (D.C. Cir. 2001) (cited hereinafter as "ASCENT"). The court stated that, "the Act's structure renders implausible the notion that a wholly owned affiliate providing services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name of its ILEC parent, should be presumed to be exempted from the duties of that ILEC parent." *Id*., 235 F.3d at 668.

obligations extend to its affiliate, whether it continues to exist as a separate entity or whether it is integrated into the ILEC.[37]

In all events, if certain capabilities associated with SBC/Ameritech's Project Pronto architecture are considered, for the moment, subject to the FCC's rules regarding "packet switching", the Commission should still require unbundling of these capabilities in all circumstances where SBC/Ameritech has deployed fiber-fed, DLC-equipped loops, pursuant to the criteria set forth in the Paragraph 313 of the *UNE Remand Order*.

3. Even if the Commission finds that one or more of the UNE Remand Order unbundling criteria are not met, it has the authority to order the unbundling of the "packet switching" functionality of Project Pronto

If the Commission determines that any of the criteria from FCC Rule 51.319(c)(5) are not satisfied, it has the authority from federal and state law to order -- and it should order -- the unbundling of "packet switching" components in the NGDLC Project Pronto architecture. As set forth above, the FCC rules permit state commissions to order additional unbundling. "A state commission must comply with the standards set forth in this § 51.317 when considering whether to require the unbundling of additional network elements." 47 C.F.R. § 51.317(b)(4). Additional unbundling by state commissions is sanctioned by the FCC.

The FCC gave specific direction in the UNE Remand Order about unbundling "packet switching" elements if CLECs to prove that lack of access to such elements impairs their ability to offer advanced services.

> We note, however, that (CLECs) are free to demonstrate to a state commission that lack of access to the incumbent's frame relay

[37] Application of Verizon New York Inc. et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Connecticut, Memorandum and Order, CC Docket No. 01-100, FCC 01-208, at ¶¶ 28-33 (rel. July 20, 2001).

> network element (a form of packet switching) impairs their ability to provide the services they seek to offer. A state commission is empowered to require incumbent LECs to unbundle specific network elements used to provide frame relay service, consistent with the principles set forth in this order. *UNE Remand Order*, at ¶ 312.

Here, using the authority granted by the FCC, the Commission specifically can and should declare the packet switching elements of Project Pronto to be network elements that must be offered to CLECs on a non-discriminatory, unbundled basis.

Using this federal authority this Commission can order additional unbundling under the Illinois Public Utilities Act § 13-505.6**.** The Commission should apply the impair standards from FCC Rule 51.317(b)(2). Joint CLECs detailed above (in Section III.C) that they are impaired without access to the Project Pronto network elements, including the so-called "packet switching" elements. Briefly, joint CLECs demonstrated that is impaired without access to the Project Pronto UNEs because (1) the Broadband Offering is a service offering that can be withdrawn at any time and is not subject to state commission oversight; (2) collocation of DSLAMs are costly, timely and inefficient; and (3) the existing copper loop network will not allow Joint CLECs to deploy advanced services on a ubiquitous and nondiscriminatory basis. If the Commission does not find that the *UNE Remand Order* criteria are satisfied, then using the impair analysis set forth by Joint CLECs the Commission should determine that CLECs are impaired without access to the "packet switching" network elements in Project Pronto.

IV. AMERITECH'S THREAT NOT TO DEPLOY PROJECT PRONTO IF REQUIRED TO UNBUNDLE IS NOT CREDIBLE

SBC/Ameritech's advocacy in this case has painted itself into a corner. On one hand, SBC/Ameritech attempts to strong-arm the Commission by stating that it will not deploy Project Pronto in Illinois if it is required to make it available to CLECs on an unbundled basis. On the other hand, the evidence on rehearing unequivocally demonstrates that SBC/Ameritech must

deploy Project Pronto in Illinois to compete effectively in the advanced services market, achieve the undeniable network efficiencies from a packet switched network, and provide a platform for future services such as video, gaming and voice over DSL. SBC/Ameritech's *Investor Briefing* summarizes that the "broadband platform and greatly expanded broadband revenue potential give SBC the opportunity to create significant shareowner value – well in excess of $10 billion NPV." (SBC Investor Briefing No. 211, *SBC Announces Sweeping Broadband Initiative* (Oct. 18, 1999), attached to Sprint Rehearing Exh. 3.0 as JRB-2, at 11). The reality is that after all of the threats and political maneuverings, SBC/Ameritech cannot afford to halt deployment of Project Pronto in Illinois. In fact, the evidence shows that even during this self-imposed "suspension" SBC/Ameritech has continued with many elements of the Project Pronto deployment in Illinois. Also, contravening its statements to this Commission that unbundling Project Pronto will have a material effect on its finances, SBC/Ameritech tells Wall Street and its investors that the Project Pronto business case is solid and that unbundling obligations will have no material effect on its financial position. The Commission recognized in the Tariff Order that the "evidence in this case clearly and unequivocally demonstrates that SBC is deploying Project Pronto to generate significant savings in maintenance costs and to increase the ability of its data affiliates to serve customers with xDSL service." (Tariff Order, at 23). Not only is this still true, the evidence on rehearing is even "clearer" and more "unequivocal." In short, SBC/Ameritech's threats to suspend permanently Project Pronto are not credible.

A. SBC/Ameritech initially intended to offer the xDSL elements of Project Pronto as UNEs.

The first indication that SBC/Ameritech intends to continue its deployment of Project Pronto even if the Commission upholds its decision and unbundles the Project Pronto network elements requested by the CLECs is that SBC/Ameritech originally intended to offer the Project

Pronto infrastructure on an UNE basis and allow for some form of collocation of plug-in cards by CLECs. This conclusion is readily attained by examining the cross exhibits admitted into the record.

In fact, SBC/Ameritech gave a presentation to CLECs on March 1, 2000 in Dallas, Texas that described the new products that SBC/Ameritech ILECs were going to offer CLECs. A power point presentation given by SBC/Ameritech witness Mr. Boyer at that meeting is admitted into the record as Rhythms Boyer Rehearing Cross Exh. 1. It states that the "Project Pronto unbundling plan is a work effort within the Wholesale Marketing division of SBC to provide unbundled access to the infrastructure being deployed under Project Pronto. The infrastructure itself will belong to the SBC TELCOs and will be provided on a leased basis to CLECs …"(*Id*. at 500104). The document is replete with examples that SBC/Ameritech intended to offer the Project Pronto elements to CLECs on unbundled basis. Starting on page 500122 the document describes the various UNEs that would be made available to CLECs including (1) a UNE subloop from the NID to the SAI; (2) DLE ADSL UNE Feeder loop from the port termination at the NGDLC to the to the OCD Port; and (3) OCD Port Termination. (*Id*. at 500122). Clearly, SBC/Ameritech intended to offer CLECs access to multiple unbundled network elements over the Project Pronto platform. (*Id*. at 50019, ("SBC will unbundle access to the network elements as defined by the DLE infrastructure") (Rehearing Tr. (Boyer) at 1111).

The Commission should discount any arguments that SBC/Ameritech only thought of unbundling Project Pronto before it obtained the *FCC Waiver Order*. In fact, the exhibit explains that SBC/Ameritech has requested a waiver of certain merger conditions and the "products outline[d] in this presentation are based upon the assumption that SBC receives the interpretation of the merger conditions allowing SBC to own both the OCD and the ADLU (DSL

line card) in the remote terminal." (Rhythms Boyer Rehearing Cross Exh. 1, at 500103). Mr. Boyer confirmed on cross examination that SBC/Ameritech still called the offering UNEs at this time. (Rehearing Tr. (Boyer) at 1109).). Although Mr. Boyer insists now that he only thought of the offering as an end to end UNE rather than the multiple UNEs described in the exhibit, (*Id*.) the result is the same: SBC/Ameritech planned to provide Project Pronto as UNEs to CLECs.

The confidential exhibits introduced into the record also reflect that SBC/Ameritech intended to offer Project Pronto as UNEs. SBC/Ameritech witness Mr. Boyer wrote the Marketing Service Descriptions introduced as exhibits Rhythms Boyer Rehearing Cross Exhs. 2P, 3P, and 4P. **BEGIN CONFIDENTIAL** ***XXXXXXXXXXXXXXXXXXXXXX. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***END CONFIDENTIAL**

The evidence is conclusive. SBC/Ameritech intended to offer the Project Pronto architecture as UNEs and considered various scenarios for card collocation and cross connecting loops to the NGDLCs until at least April, 2000. Ameritech's complaints now that it will not continue deployment of Project Pronto and do exactly what SBC/Ameritech's internal documents say that it was planning to do is not credible.

B. Project Pronto will pay for itself by the network efficiencies generated from its deployment.

The Commission is aware that in Project Pronto SBC/Ameritech, is investing $6 Billion in the 1999 to 2002 timeframe to bring fiber facilities much closer to neighborhoods across its thirteen-state region. This deployment of facilities will drastically increase the availability of DSL to consumers. The deployment of fiber and next-generation remote terminals will enable SBC to overcome loop length and line condition limitations in its network. (See Generally, Sprint Rehearing Exh. 3.0, JRB-2). The end result of Project Pronto is to bring fiber closer to the home "so that DSL services will be available to approximately 80% of SBC's customers" territory-wide and raise the number of DSL enabled households in Illinois from **BEGIN CONFIDENTIAL** *** XXXXXXX ***__END CONFIDENTIAL__ or an additional **BEGIN CONFIDENTIAL** *** XXXXXXXX***__END CONFIDENTIAL__ business and residence locations in Ameritech Illinois territory (*FCC Waiver Order*, ¶4; (SBC/Ameritech Rehearing Exh. 8.0P, at 22).

While the benefits of increasing the market for DSL are apparent and worth investing a large sum of money, the placement of Project Pronto NGDLCs, OCDs and the other network improvements made have additional benefits. SBC/Ameritech claims in its *Investor Briefing* materials that the "network efficiency improvements alone will pay for this initiative." (Sprint Rehearing Exh. 3.0, JRB-2, at 2) SBC/Ameritech also states in the *Investor Briefing* that it will attain "annual savings of $1.5 Billion by 2004" and that the "capital and expense savings pay for initiative on NPV basis." (*Id*.) The *Investor Briefing* describes in detail the dramatic impact that deploying Project Pronto will have on the cost structure of the network. In particular, SBC/Ameritech expects to realize expense savings because the fiber it is deploying is much more efficient than the copper it is replacing from a maintenance standpoint and with fiber, "the cost

of providing additional bandwidth via electronics will be significantly less than adding more copper lines." (Sprint Rehearing Exh. 3.0, JRB-2, at 7). SBC/Ameritech also intends to realize capital expenditure savings for feeder, trunking and provisioning of $600 million annually by 2004 as a result of its network upgrades. (*Id*.) Moreover, included in Project Pronto is network efficiency initiatives including a projected cost savings of $450 million from converting the current copper based T-1s to new lower cost fiber facilities. (*Id*. at 6; See Also Sprint Rehearing Exh. 5.0, at 12). Consequently, it would be foolish for SBC/Ameritech to stop upgrading the network from which it expects huge expense and capital efficiencies.

While SBC/Ameritech witness Ireland made vague statements at the hearing that the company may not realize all of the efficiencies from building Project Pronto that it claimed (Rehearing Tr. (Ireland), at 507), its public documents reveal no substantive change in the business case documents introduced as exhibits or from the *Investor Briefing*. (See, Rhythms Ireland Rehearing Cross Exhs. 2P and 3P). For example, in the *Investor Briefing* dated December 19, 2000, the company stated, "SBC continues to deploy Project Pronto , its high-capacity next generation local network. Launched in October, 1999, Project Pronto is creating a robust, data-centric network architecture capable of delivering broadband services and significant operating efficiencies." (Sprint Ireland Rehearing Cross Exh. 1, at 2). Moreover, in the *Investor Briefing* dated April 23, 2001, the company quoted Chairman Whitacre who stated, "While we are only two years into broadband and still have considerable work to do, demand is strong, per customer financial metrics are improving, and we are **confident in our business model**…" (Sprint Ireland Rehearing Cross Exh. 2, at 4 (emphasis added)). At the hearing Mr. Ireland could not identify any business model other than the one created for the 1999 *Investor Briefing.* (Tr. Rehearing (Ireland), at 484.) Consequently, even after this Commission's

decisions in the *Tariff Order* and the *Rhythms/Covad Arb. Award and Arb. Rehearing Award*, SBC/Ameritech continued to believe in its business model and that it expected to gain efficiencies from deploying Project Pronto.

Perhaps the best evidence of the sustainability of Project Pronto with or without unbundling is found in SBC's 2000 annual report dated February 9, 2001. In it SBC/Ameritech provides its investors with assurance that any unbundling obligations it may incur as a result of the D.C. Circuit Court's decision in *ASCENT v. FCC* will **not** have a material effect on its finances. In the context of discussing advanced services, the creation of advanced services affiliates to avoid the resale requirement in §251(c)(4), and referring to the Project Pronto rollout, the Annual Report states:

> In January, 2001, the (D.C. Circuit Court) struck down the FCC merger condition that allowed our separate affiliates offering DSL and other advanced services exemption from the Telecom Act resale requirement. Although the merger condition allows us to re-absorb the affiliates into our telephone companies under such circumstances, the final resolution of this issue remains uncertain. However, **potential efficiency benefits likely outweigh resale and unbundling obligations that would apply to advanced services and we do not believe, at this time, that this issue will have a material effect on our results of operations or financial position.** (Sprint Ireland Rehearing Cross Exh. 4, at 13 (emphasis added)).

Thus, unbundling Project Pronto in the eyes of SBC/Ameritech's executives would not have a material effect on its operations or financial position. Mr. Ireland, SBC/Ameritech's CTO and an Officer of the Company did not disagree with that statement when he read it at the hearing. (Rehearing Tr. (Ireland), at 506-07). Clearly based on the projected network efficiencies and savings alone, SBC/Ameritech will deploy Project Pronto regardless of its unbundling obligations as it told its investors it would in February, 2001.

C. Project Pronto is the platform of the future; SBC/Ameritech expects huge revenues from services offered on the `Project Pronto platform.

In addition to generating expected efficiencies, SBC/Ameritech expects Project Pronto to generate substantial revenues over time. The *Investor Briefing* stated:

> SBC expects its broadband initiative to dramatically improve its ability to deeply penetrate the growing market opportunity for broadband services, especially in the consumer and small and medium business markets. DSL services alone are targeted to add approximately $3 billion to annual revenue within the next five years with another $500 million coming from other new or replacement products. This $3.5 billion revenue opportunity represents an additional 100 basis points in top-line growth by 2004. (Sprint Rehearing Exh. 3.0, JRB-2, at 7-8).

Without deploying Project Pronto in Illinois, SBC/Ameritech will lose a substantial portion of its projected revenue given that it will not be able to provide DSL service to the additional ***BEGIN CONFIDENTIAL** XXXXXXXX ***END CONFIDENTIAL** business and consumer locations in Illinois that SBC/Ameritech is targeting with deployment of Project Pronto. (SBC/Ameritech Rehearing Exh. 8.0P, at 22).

Deployment of Project Pronto also permits SBC/Ameritech to obtain faster speeds for DSL service since the copper loop lengths will generally be 12,000 feet or less. This permits SBC/Ameritech to make asymmetrical 6Mbps service available to initially more than 60% of its customer base. (Sprint Rehearing Exh. 3.0, JRB-2, at 8). Faster speeds permit SBC/Ameritech to charge more for the service and achieve superior financial characteristics. (Rehearing Tr. (Ireland), at 486; Sprint Ireland Rehearing Cross Exh. 2, at 5). Increase in speeds to 6Mbps. to such a large segment of the market cannot be done without Project Pronto.

Also, while voice traffic today is predominantly circuit switched, the deployment of Project Pronto "will give SBC the flexibility to readily move to other voice protocols, including voice over ATM, voice over ADSL and, ultimately voice over IP." (Sprint Rehearing Exh. 3.0, JRB-2, at 2). The *Investor Briefing* also discusses that deployment of Project Pronto enables other products such as distance learning, video conferencing, remote management, web hosting

and server hosting. (*Id*. at 8-9). Finally, an additional $500 million net revenue opportunity by 2004 is targeted for products like switched virtual circuits, voice over DSL, and VPOP-DAS. (*Id*.) Finally, SBC/Ameritech is conducting trials now of new applications such as video gaming connection to multiple hosts like corporate LANs. SBC/Ameritech intends to offer those applications over Project Pronto. (Rehearing Tr. (Ireland), at 489-90). In sum, SBC/Ameritech has huge additional revenue opportunities with Project Pronto. It is difficult to believe that it will not continue deployment of Project Pronto in Illinois to realize the revenue possibilities of this network improvement.

Although SBC/Ameritech stands to increase revenue and reduce expenses and capital outlays significantly with the deployment of Project Pronto, SBC/Ameritech also has claimed that the Project Pronto investment is an ambitious, risky, network project (SBC/Ameritech Rehearing Exh. 1.0, at 6). The investment can hardly be considered risky given that SBC/Ameritech did not have to issue additional equity or debt to finance the project. It is being financed out of its existing capital structure. (Rehearing Tr. (Ireland), at 454-457). In fact, the *Investor Briefing* states that "with current operating cash flow in excess of $15 billion, the company (SBC/Ameritech) has plenty of capacity to fund this investment within its existing capital structure." (Sprint Rehearing Exh. 3.0, JRB-2, at 10). Given the efficiencies of the investment alone and the ability to finance it within the existing capital structure with no need to issue equity or take on additional debt, this investment can hardly be called risky in the investment sense of the term.

D. Project Pronto is required for Ameritech to respond to competitive service providers such as cable modem and satellite

Moreover, from a competitive viewpoint, it makes no sense for SBC/Ameritech to stop the deployment of Project Pronto due to unbundling obligations. To do so would be competitive

suicide. Mr. Ireland testified that SBC/Ameritech truly wants to deploy Project Pronto in Illinois to compete with cable modems. (SBC/Ameritech Rehearing Exh. 1.0, at 10). On cross examination, Mr. Ireland testified the SBC/Ameritech's three primary reasons for deploying Project Pronto are competing with cable modems, network cost savings, and revenue opportunities. (Rehearing Tr. (Ireland), at 261-264) Nowhere in this equation is competition with other DSL providers. In other words, Mr. Ireland testified, SBC/Ameritech does not consider DSL providers to be a significant competitive threat. (*Id*. at 264-65). Additionally, the confidential business case documents describe that deployment of Project Pronto is necessary to accomplish the strategic objectives of ***__BEGIN CONFIDENTIAL__ "XXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX"***__END CONFIDENTIAL__ (Rhythms Ireland Rehearing Cross Exh. 3P, at 202426). The question is raised why would SBC/Ameritech stop the deployment of its primary weapon in competing against cable modems because it refuses to unbundle its fiber/copper loop network. The answer is self-evident. SBC/Ameritech does not intend to give the advanced services market to cable modem providers without a fight; Project Pronto will be deployed in Illinois regardless of the outcome of this case.

E. SBC/Ameritech must deploy Project Pronto to economically meet the new Illinois legislation.

Illinois law now requires ILECs in Illinois to speed deployment of advanced telecommunications services. The General Assembly knew that the Commission ordered SBC/Ameritech to unbundle Project Pronto in the *Tariff Order* on March 14, 2001 and that SBC/Ameritech suspended its deployment of Project Pronto. As a response to SBC/Ameritech's threatened non-deployment, the General Assembly responded by passing an advanced services deployment requirement in the telecom law rewrite. As of July 1, 2001, Illinois law requires

SBC/Ameritech to “offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005. (220 ILCS § 5/13-517(a)). When questioned at the hearing about this provision, Mr. Ireland testified that it is possible for SBC/Ameritech to use other options such as reselling satellite services to meet the 80% requirement. (Rehearing Tr. (Ireland), at 475). But Mr. Ireland acknowledged that deployment of Project Pronto in Illinois is the best option for meeting the legislation’s requirements. (*Id*. at 477). Given the legislative history behind the enactment of this statute, deployment of Project Pronto is clearly what the General Assembly had in mind when it enacted this statute.

F. Contrary to its prefiled testimony, SBC/Ameritech has not really stopped deploying Project Pronto DSL deployment in Illinois.

Although SBC/Ameritech contends that it completely has stopped deployment of Project Pronto DSL facilities in Illinois in reaction to the Commission’s *Tariff Order,* (SBC/Ameritech Rehearing Exh. 1.0, at 10) the facts belie these claims. SBC/Ameritech has acknowledged that rolling T-1s from copper to fiber is part of the Project Pronto initiative. (Sprint Exh. 3.0, JRB-2, at 6). This effort continues even though Project Pronto is “suspended” in Illinois. Mr. Keown testified that the ***BEGIN CONFIDENTIAL “XXXXXXXXXXXXXXXXXXXX XXXX”***END CONFIDENTIAL (Rehearing Tr. (Keown), at 2420). To accomplish the objective of rolling copper T-1s to fiber, ***BEGIN CONFIDENTIAL XXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***END CONFIDENTIAL (Rehearing Tr. (Keown), at 2420- 2430) All of this Project Pronto

architecture is being deployed and used even though SBC/Ameritech allegedly has suspended deployment of Project Pronto. In sum, SBC/Ameritech has continued to deploy all elements of its Project Pronto architecture except the ADLU cards and the electronics for the OCDs during the alleged "suspension." At any point, SBC/Ameritech can install the ADLU cards and the OCD cards and Project Pronto will be "on" again in Illinois without much effort.

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The evidence shows that SBC/Ameritech cannot afford to suspend Project Pronto. The company's internal documents show that it originally designed the offering to be a UNE based offering. The company expects to generate billions of dollars in expense and capital savings from the project. Moreover, SBC/Ameritech expects to receive billions of dollars of revenues from Project Pronto in the form of increased DSL revenues, voice over DSL, distance learning, video gaming and other potential services that can be provisioned over this network. SBC/Ameritech's internal documents also show that Project Pronto is its best means to compete with the cable modem providers for high speed Internet access customers. In fact, other DSL providers are not really on its radar screen of competitors. Failure to deploy Project Pronto because of unbundling obligation makes no rational sense in light of the competitive challenges. In addition, Project Pronto is the only realistic method by which SBC/Ameritech can meet the General Assembly's directive to deploy advanced services to 80% of its customer base. And finally, the evidence shows that the Project Pronto "suspension" is not really a suspension at all. SBC/Ameritech continues to deploy elements of Project Pronto right now.

V. THE WEIGHT OF EVIDENCE DISPROVES AMERITECH'S CLAIM THAT OFFERING PROJECT PRONTO AS UNES AND CLEC LINE CARD COLLOCATION WOULD BE TECHNICALLY INFEASIBLE AND COST PROHIBITIVE

A. Cost is not the reason SBC is refusing to unbundle PP

Although SBC/Ameritech claims that it suspended deployment of Project Pronto in Illinois due to the cost of implementing the Commission's order requiring unbundling of the platform, the evidence in this case proves otherwise. The Joint CLECs demonstrate below that SBC/Ameritech's so-called "cost analysis" indicating that unbundling Project Pronto could cost $500 million is completely unfounded. However, even if the cost projections had any basis, SBC/Ameritech's chief technology officer tested under oath that cost is not the real reason that Project Pronto was suspended. He testified, that even if it would cost no more to offer Project Pronto as UNEs rather than an end to end service, he likely would not deploy Project Pronto due to "the inability to be able to control the asset in a competitive marketplace." Hearing Tr. (Ireland) at 307:14-308:11. Such a viewpoint is directly contrary to the goals of TA 96 and the directives of the FCC regarding unbundling. The essence of a UNE is that CLECs are able to access ILECs' networks on an unbundled basis to obtain the facilities they need to provide service to their customers. CLECs are entitled to lease and control the facility for a given period. *UNE Remand Order* at ¶86; 47 C.F.R. § 51.319(c). The Commission should reject SBC/Ameritech's scare tactics and uphold its order requiring unbundling of Project Pronto.

B. SBC/Ameritech improperly users a "snapshot" instead of a "movie" view of technology to confuse the ICC

SBC/Ameritech is attempting to give the Commission a misleading picture of the capabilities of its Project Pronto platform and the feasibility of unbundling it by presenting a very narrow snapshot in time of the initial configuration it plans to deploy. As the Alcatel documents indicate, and as good engineering practice demands, SBC/Ameritech should make an *initial* deployment that is sized to meet the first increment of demand for services supported by that platform, and then should grow that installation in the manner described and supported by

Alcatel. Rhythms' Rehearing Exh. 2.1 (Watson), at 11. Thus, the proper view is really more like a movie than a snapshot.

The Alcatel engineering documents admitted as exhibits in this proceeding present a clear and easily understood growth path for the Litespan platform. SBC/Ameritech must be well aware of each of those components. Any reasonable outside plant planner would want to take advantage of new features and functions as they become available from Alcatel, including the quad ADLU card, high capacity POTS Channel Bank Assemblies, multiple PVPs per channel bank, etc. However, SBC/Ameritech's position in this proceeding (as well as the three proceedings before) makes clear that, at many points where it had to make an engineering decision on its Project Pronto deployment, SBC/Ameritech has chosen the option that makes it difficult to expand the Litespan platform as growth occurs, and makes it difficult for CLECs to obtain efficient access to the Litespan platform and the Project Pronto network elements. Rhythms Rehearing Exh. 2.1 (Watson), at 11-12.

C. SBC/Ameritech witnesses denied the plain meaning of their own internal technical documents to convince the Commission it should reverse its order requiring unbundling of Project Pronto UNEs and CLEC line card collocation

Numerous technical documents admitted as exhibits in this proceeding clearly demonstrate the technical capabilities of Project Pronto network components and the feasibility of unbundling those components including unbundling and collocation of line cards. When confronted with these documents, however, SBC/Ameritech witnesses denied their plain meaning and asked the Commission instead to accept a revisionist interpretation. Mr. Boyer repeatedly stated that a document showing that Project Pronto would be offered as UNEs was wrong. For example, the handout that SBC gave to CLECs at an industry meeting introducing them to Project Pronto stated that the platform would be offered as UNEs. Rhythms' Boyer

Rehearing Cross Exh. 1. The document states "SBC will unbundle access to the network elements." *Id*. at 18. Mr. Boyer now contends that the document was wrong. He testified that "[the document] may state that, but that was not the intention at the time." *Id*. at 1111:17-18. The document also stated that CLECs would have the option of collocation as a means to access unbundled elements. Rhythms' Boyer Rehearing Exh. 1 at 18. Again Mr. Boyer denied the plan meaning of the document and even arguing about the definition of the word "option."

Similarly, both Mr. Keown and Mr. Ireland agreed that the Project Pronto Loop Deployment Guidelines document is the **BEGIN CONFIDENTIAL*** "XXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXX***** END CONFIDENTIAL** Hearing Tr. (Keown), 2429:3-2430:2

D. Keown's claims of capacity constraints ignore changes that are imminent that eliminate alleged costs

SBC/Ameritech asserts numerous incorrect claims that the Project Pronto equipment will be severely constrained if the Commission's order is upheld. These arguments ignore

configuration options and technology changes that are imminent. Whether SBC/Ameritech's tactic is accidental[38] or intentional, the capacity constraints it asserts are incorrect.

1. Litespan Can Support More Than One Channel Bank per PVP

The unrebutted evidence in this proceeding clearly demonstrates that SBC/Ameritech's assertions regarding multiple PVPs is incorrect. SBC/Ameritech claims that the Litespan system cannot support the Commission's order that CLECs be given PVPs between the RT and the OCD. However, Dr. Ransom, chief technology officer for Alcatel, testified that the Litespan NGDLC will be able to support multiple PVPs per channel bank with Release 11.0 , of its system software. Rehearing Tr. (Ransom), at 694:17-695:22. **BEGIN CONFIDENTIAL***** XXXX, XXXXXXXX *****END CONFIDENTIAL** will support **BEGIN CONFIDENTIAL***** XX ***** END CONFIDENTIAL** PVPs per channel bank, up to a maximum of **BEGIN CONFIDENTIAL***** XXX ***** END CONFIDENTIAL** per chain. *Id.*, at 824:22-825:10*;* Rhythms' Rehearing Ransom Cross Exh. 15P, at Bates A04-000007. It is possible that the Litespan could support even more PVPs per channel bank in the future, as Alcatel initially told SBC that it was targeting supporting 1,000 PVPs per Channel Bank Assembly for Release 11**.** Rhythms' Rehearing Ransom Cross Exh. 14P, at Bates A14-000099. [39] Thus the clear weight of evidence in this proceeding proves that the Project Pronto Channel Bank Assemblies can support multiple PVPs, and the Commission's order that CLECs be able to purchase PVPs as UNEs is entirely feasible. The Commission should uphold its decision and order SBC/Ameritech to offer PVP UNEs as soon as Release 11 has been deployed by SBC/Ameritech, which is expected to

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[38] Mr. Keown, one of the primary witnesses making these claims, admitted under oath that he is **BEGIN CONFIDENTIAL ***** "not on the leading edge of the technology." ***** END CONFIDENTIAL** Rehearing Tr. (Keown), at 2460:3-4.

[39] As this email makes clear, SBC was requesting **BEGIN CONFIDENTIAL*****multiple PVPs per Channel Bank Assembly *****END CONFIDENTIAL** over a year ago.

occur by the end of the year. Rehearing Tr. (Ransom) at 666:8-667:4; Rehearing Tr. (Keown) at 2022:11-22.

2. Litespan Throughput Capacity Is Easily Expandable

The unrebutted evidence in this proceeding clearly demonstrates that SBC/Ameritech's claims that the Litespan is severely capacity constrained are incorrect. First, SBC/Ameritech's own witnesses acknowledged that there are currently no capacity constraints on the system. Mr. Boyer testified at the hearing, and stated in internal documents that the **BEGIN CONFIDENTIAL*** ** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***** END CONFIDENTIAL.** Rehearing Tr. (Boyer), at 1128:2-22; Rhythms' Boyer Rehearing Cross Exh. 2P, at 4; 3P, at 5; 4P, at 4. Furthermore, even if the capacity of the Litespan begins to be consumed, there are numerous means to increase the capacity. Alcatel's internal documents attest to the ease of increasing capacity. The Litespan Integrated ADSL/G.SHDSL Planning Guide issued in April 2001 states:

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Among the means for increasing the throughput capacity of the Litespan are "un-daisy chaining" the ADSL Channel Bank Assemblies. **BEGIN CONFIDENTIAL*** ** XXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX*****END CONFIDENTIAL** *Id.;* Rehearing Tr. (Boyer), at 1128:2-22; Rhythms' Boyer Rehearing Cross Exh. 2P, at 4; 3P, at 5; 4P, at 4. **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXX*****END CONFIDENTIAL.** Rehearing Tr. (Keown), at 2350:22-2351:14. Furthermore, the bandwidth of fiber optic cables can be expanded almost without limit in a variety of ways, including increasing the transmission rate of the electronics at both ends of the fiber system, and the deployment of wave division multiplexing and dense wave division multiplexing, which derived additional bandwidths on the same fiber system by using lasers that transmit and receive at multiple wavelengths of light simultaneously. Rhythms' Rehearing Exh. 2.0P (Watson), at 11.

Another means to increase the capacity of the Litespan is to upgrade from the Litespan 2000 to a Litespan 2012. **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXXXXXXXXX

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX *****END CONFIDENTIAL.** Rhythms' Rehearing Exh. 2.1P (Watson), at 7. **BEGIN CONFIDENTIAL***** XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXX*****END CONFIDENTIAL.** Thus, this approach can also triple the ADSL ATM throughput of the NGDLC. *Id.*

3. RT cabinets are not limited to three fully loaded ADSL channel banks

Currently, cabinet RTs are limited to three Channel Bank Assemblies fully loaded with ADLU cards, but that limit can be easily expanded by using a slightly larger **BEGIN CONFIDENTIAL***** XXXXXXX*****END CONFIDENTIAL** cabinet instead of the Litespan 2016 cabinet. Rhythms' Keown Rehearing Cross Exh. 3P, at 10 and Planning Requirement Attachment; Rhythms Ransom Rehearing Cross Exh. 7P, at Bates A01-0000037, A01-000055 check. The **BEGIN CONFIDENTIAL*****XXXXXXXXXXXX *****END CONFIDENTIAL** Channel Bank Assemblies to be populated with ADLU cards thereby **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXX*****END CONFIDENTIAL.** *Id.*; Rehearing Tr. 2415-17. The Alcatel documents indicated that the **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXX *****END CONFIDENTIAL**. Rhythms' Keown Rehearing Cross Exh. 3P; Rehearing Tr. (Keown), at 2418:8-15.

4. SBC/Ameritech's claims of slot exhaust if CLECs collocate NGDLC line cards are unfounded

SBC/Ameritech claims that CLECs should be barred from owning and collocating NGDLC line cards. SBC/Ameritech bases this claim on an incorrect assertion that CLEC collocation of line cards would prematurely exhaust the NGDLC's capacity because such cards

would occupy a slot, but might not be fully utilized. However, the weight of evidence in this proceeding shows that such NGDLC "exhaust" is unlikely given the current state of technology.

a. Card Pooling and sharing arrangements would eliminate any "stranded" capacity or slot exhaust concerns

SBC/Ameritech complains, that if CLECs are allowed to collocate line cards, it could strand capacity because at any given time the CLEC card might not be fully utilized. Any so-called "stranded" capacity issue is less of a problem than SBC/Ameritech would have the Commission believe and is no different than SBC/Ameritech line cards that are deployed in bulk in advance and therefore have unused capacity.

The problem is not so severe as SBC/Ameritech claims. Each port on line card in a Channel Bank Assembly is fully utilized before the next card is assigned. Rhythms Rehearing Exh. 2.0 (Watson), at 31. Thus, it is only the last CLEC card installed in a channel bank assembly that can be less than 100 percent utilized when first installed. *Id*.; Rehearing Tr. (Keown), at 2134:1-4.

Furthermore, SBC/Ameritech witnesses admitted that the ILEC's "stranded" capacity concerns will be eliminated if CLECs share or pool cards. Rehearing Tr. (Keown), at 2132:6-2133:3; (Ireland), at 339:1-340:8. Card sharing is an approach in which multiple CLECs would share ports on a single line card. Rehearing Tr. (Hamilton), at 1301:17-1302:13. **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXX*****END CONFIDENTIAL.** Rhythms' Boyer Rehearing Cross Exh. 2P at 7; Rehearing Tr. (Boyer) at 1130:9-1132:8. SBC/Ameritech's internal documents show that **BEGIN**

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The Joint CLECs submit that SBC/Ameritech could immediately implement a card pooling arrangement because there would be need to inventory the owner of the card. Instead, SBC/Ameritech need only keep a count of the number of cards and ports provided by the CLECs. Such a count is a simple bookkeeping matter. Such pooling should be ordered only as an interim measure until SBC/Ameritech can make the modest changes necessary to inventory and assign CLEC-owned cards. Once the OSS changes have been made, SBC/Ameritech should be ordered to allow CLECs to virtually locate line cards and share ports on them. Finally, if over time virtual collocation of line cards proves insufficient to meet CLECs' needs, the Commission should hold open an opportunity for CLECs to physically collocate their line cards in the Project Pronto NGDLC.

b. SBC/Ameritech has substantial unused capacity

SBC's internal documents show that the highest projected level of demand for xDSL services will require only a fraction of the total capacity of NGDLCs. SBC's smallest RT housing (cabinets) will house three Channel Bank Assemblies for ADLU cards, and each channel bank has 56 slots. Currently, ADLU cards support only two ADSL lines but Alcatel will shortly be making available a "quad" ADLU card that supports four ADSL lines per card. Rehearing Tr. (Ransom), at 664:15-666:12; Rhythms Rehearing Exh. 2.1 (Watson), at 7. Thus, SBC/Ameritech's smallest RTs have a total capacity to support 336 (dual cards) or 672 (quad cards) xDSL customers and 2,016 potential POTS customers served from a cabinet RT.

Rhythms' Rehearing Exh. 2.0 (Watson), at 27 [40] In the larger CEV or hut RT configuration, up to **BEGIN CONFIDENTIAL*** XXX ***END CONFIDENTIAL** Channel Bank Assemblies can be fully equipped with ADLU cards to support line shared POTS voice and data. Ransom Cross Exh. 7P, at Bates A01-000037, 000055.

SBC's deployment document for Project Pronto instructs outside plant engineers to assume a maximum take rate for ADSL service at **BEGIN CONFIDENTIAL***XXXXXXXX XXXXXXX ***END CONFIDENTIAL** for residential customers and **BEGIN CONFIDENTIAL***XXXXXXXXX ***END CONFIDENTIAL** for business customers. Rhythms' Keown Rehearing Cross Exh. 3P, at 9. Even if residential and business customers both subscribed to xDSL service at the highest estimated rate, only **BEGIN CONFIDENTIAL*** XXXXX***END CONFIDENTIAL** percent of the total lines in the NGDLC would be needed for xDSL services. *Id*. Thus, even SBC/Ameritech witness Mr. Keown admitted that at a **BEGIN CONFIDENTIAL*** XXXXXX***END CONFIDENTIAL** percent take rate, there are **BEGIN CONFIDENTIAL*** XXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***END CONFIDENTIAL.** Rehearing Tr. (Keown), at 2148:5-18. That is, even the smallest RTs support an xDSL take rate of 33 percent, while SBC's highest projection for total take rate for xDSL services is **BEGIN CONFIDENTIAL***XX ***END CONFIDENTIAL** percent, and the average take rate projected by SBC/Ameritech is only **BEGIN CONFIDENTIAL***XXXX ***END CONFIDENTIAL**. Rhythms' Rehearing Exh. 2.0P (Watson), at 27.[41] SBC's own planning documents thus show that even the smallest RTs will have a surplus capacity for xDSL

[40] Rhythms Texas Exh. 15A(013538-013620), at Bates 013578; Rhythms Texas Exh. 58A (021060-076) at Bates 021060-076, for Southwestern Bell Telephone Company ("SWBT"), the sister company of SBC/Ameritech in the SBC corporate family.

[41] Rhythms Texas Exh. 12A (000211-289), at 7 (Bates IP 000216).

services of **BEGIN CONFIDENTIAL*****XXXXX*****END CONFIDENTIAL** percent. SBC/Ameritech witness Mr. Keown admitted on cross examination that the earliest SBC/Ameritech could have capacity problems is two years from now. Hearing Tr. (Keown), at 2154:4-9.

c. SBC itself has unused ports on cards in NGDLC slots

SBC/Ameritech's asserted concerns about unused ports on ADLU cards if CLECs own and collocate them are hypocritical and should be given no weight. SBC/Ameritech deploys its own ADLU cards in quantities to satisfy demand for four to six months. Rehearing Tr. (Keown), at 2136:17-18. Thus, at any given time, SBC/Ameritech has a substantial number of cards deployed in the NGDLC slots that have unused ports. *Id*., at 2136:9-12.

Moreover, the practice of deploying cards in excess of current demand is a longstanding practice at ILECs such as SBC. For example, ILECs use four-port line cards to support payphones. Once deployed, the ILEC will not break up the ports on that line card to support other types of service. Rhythms' Rehearing Exh. 2.0 (Watson), at 32. Thus, if in a particular circumstance, only one port is needed to support pay phone traffic, the other three ports on the card are unused. Similarly, ILECs must deploy a system card in Litespan channel banks in any RT from which a customer desires PBX service. *Id*. Each such card can support ring generation for all of the line cards installed in the entire Channel Bank Assembly. Such cards are never deployed individually – they are always deployed with a redundant backup. *Id*. Thus, if an ILEC has an RT in which only one customer desires PBX service, the ILEC will deploy two system cards in common control slots. If the PBX customer later disconnects, standard practice calls for the two common ringing generation cards to remain in place, still occupying NGDLC "real estate" even though there is no customer using the capabilities of the cards. *Id*.

5. Capacity of OCDs can easily be augmented

SBC/Ameritech's claims that allowing CLECs to purchase PVPs as UNEs will exhaust the capacity of the OCD are incorrect and misleading. **BEGIN CONFIDENTIAL*****XXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX *****END CONFIDENTIAL** Rehearing Tr. (Keown), at 2455:22-2456:2. In fact, it only occupies roughly half the vertical space of such a rack. *Id*. If the capacity of the first installed OCD is reached, additional OCDs can be easily installed. **BEGIN CONFIDENTIAL*** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXX*****END CONFIDENTIAL** Rhythms' Keown Rehearing Cross Exh. 5P, at Bates 001294; Rehearing Tr. (Keown), at 2449:18-2450:9. **BEGIN CONFIDENTIAL*** XXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXX*****END CONFIDENTIAL** Rehearing Tr. (Keown), at 2456:3-17.

E. SBC/Ameritech's claims of technical infeasibility for unbundling and line card collocation are incorrect

1. A cross connect field at the RT would enable CLECs to access subloops

SBC/Ameritech has chosen to deploy new Litespan RTs with the copper feeder cable pairs spliced directly onto the protector stubs that feed the NGDLC card slots, effectively hard wiring all of the feeder pairs into the NGDLC. From an engineering standpoint, this arrangement is neither required, nor optimal, especially given SBC/Ameritech's obligations to unbundle its network at technically feasible points such as at the RT. Rhythms' Rehearing Exh. 2.0 (Watson), at 21; Exh. 2.1, at 13. A much more practical, and technically feasible solution, both for new and existing RT installations, would be to terminate (depending on expected

demand) 25 to 100 feeder pairs per SAI on the field side of a small cross connect field located at the RT. *Id*. Even assuming 100 feeder pairs per SAI (and an average of four SAIs per RT), this cross connect field would be a small and easily locatable 1x1 400 pair facility. Rhythms Rehearing Exh. 2.1, at 14. The line card slots that support ADLU cards could then be wired to the office-side binder posts on this cross connect field, which would allow easy and straightforward cross connection of any ADLU card to any copper loop served from that RT. *Id*. Indeed, SBC/Ameritech's internal documents show **BEGIN CONFIDENTIAL*****XXXXX
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XXXXXXX *****END CONFIDENTIAL**. *Id*.; Rhythms Boyer R Cross Exh. 6P, at Bates KS200295. Such a cross-connect field could be built easily and inexpensively. Rhythms' witness Mr. Watson testified that, when he was an outside plant engineer at Pacific Bell, he built such cross connect fields and estimates they would cost approximately $2,000 to $2,500. Rehearing Tr. (Watson), at 1474:13-1475:2. The cross connect field could be located on the outside of the RT housing. *Id*. The Commission should order SBC/Ameritech to install such cross-connect fields at its RTs. The Commission has already ordered in the case below that SBC/Ameritech "must comply with its FCC – and Commission–mandated interconnection unbundling and access obligations." Order, *Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Docket No.

00-0393, March 14, 2001, at 23 (cited hereinafter as "*Tariff Order*"). "If Ameritech-IL has failed to deploy all equipment necessary to meet these obligations, it must do so now." *Id.*

The cross connect field described in this section is not the same as the so-called Engineering Controlled Splice ("ECS") proposed by SBC/Ameritech. The process to obtain an ECS is cumbersome, slow (it takes 63 calendar days just to get a preliminary analysis in response to a CLEC request for an ECS) and prohibitively expensive. Rhythms' Rehearing Exh. 2.0 (Watson), at 22.

2. Collocation of CLEC line cards would enable CLECs to access subloop UNEs at the RT

Despite SBC/Ameritech's assertions that subloops cannot be accessed at the RT, the clear weight of evidence in this proceeding demonstrates the opposite. Documents prepared by SBC/Ameritech unveiling Project Pronto to the CLEC community described it as UNEs and stated that collocation of line cards is "a means of access" to unbundled elements. Rhythms' Boyer Rehearing Cross Exh. 1; Rehearing Tr. (Boyer) at 1113:11-13. Similarly, SBC/Ameritech witness Mr. Ireland acknowledged that the line card in the NGDLC is the point of connection for the copper and the fiber subloop. Rehearing Tr. (Ireland), at 327:10-18. Mr. Ireland agreed that, if the card is pulled out of the NGDLC slot, it will "break the loop into two pieces."

a. Line cards are properly classified as UNEs

SBC/Ameritech witness Mr. Boyer claims that ADLU cards should not be classified as UNEs because he asserts that the card, by itself, would be of no use to a CLEC and would need to be combined with other facilities and equipment to be useful. Rehearing Tr. (Boyer), at 1099:9-12. This same argument applies with equal force (or lack of force) to every UNE. During cross examination, Mr. Boyer admitted that a loop by itself is useless unless a carrier connects the loop to switching equipment. *Id* at 1099:18-1100:14. Similarly, Mr. Boyer

admitted that local switching by itself is useless unless a carrier has a switch port and transport. *Id.*, at 1100:21-1101:13. Contrary to Mr. Boyer's assertions, the essence of UNEs to be that they are components of an ILEC's network that can be combined with other UNEs and/or CLECs' own equipment to offer service. Therefore, Mr. Boyer's argument has no basis and should be given no weight by the Commission.

b. Collocation of CLEC line cards in the NGDLC is technically feasible

The clear evidence in this proceeding demonstrates that it is technically feasible for CLECs to collocate line cards, and in fact, SBC's own internal technical personnel at one time recommended that CLECs own NGDLC line cards.

1) Alcatel manufactured and licensed line cards owned by CLECs will work in the Project Pronto NGDLC

SBC/Ameritech witnesses in this proceeding, including Dr. Ransom, Alcatel's Chief Technology Officer, acknowledged that, if CLECs purchase line cards manufactured or licensed for manufacture by Alcatel, the cards will work in the Litespan NGDLC equipment deployed by SBC/Ameritech. Rehearing Tr. (Ransom), at 650:16-651:4. Alcatel already has a program in place to license other manufacturers to produce xDSL line cards, including G.Lite, which can be line shared. Rehearing Tr. (Ransom), at 708:17-709:1; Exh. 2.1 (Watson Supp.), at 5-6; Exh. 2.1P (Watson), at 10. The Joint CLECs have made clear that they are seeking only to collocate cards manufactured, or licensed for manufacture, by Alcatel. Rhythms' Rehearing Exh. 2.0 (Watson), at 30; Exh. 2.1 at 11.

Furthermore, SBC's internal documents confirm the technical feasibility of collocating CLEC line cards in the NGDLC equipment. SBC initially planned **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXXXXXXX,*****END CONFIDENTIAL** and had prepared an entire technical document that explained how it would be accomplished. Rhythms'

Boyer Rehearing Cross Exh. 2P, at Bates 202884-202886. **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX*****END CONFIDENTIAL.** Finally, SBC admits in its own documents that **BEGIN CONFIDENTIAL ***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXX*****END CONFIDENTIAL.** *Id.*, at 013564**.**

2) SBC's internal technical personnel recommended CLEC ownership of line cards initially

For a significant period of time after SBC announced Project Pronto to its investors, SBC internal workgroups charged with deploying Project Pronto **BEGIN CONFIDENTIAL ***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXX*****END CONFIDENTIAL.** Rhythms' Boyer Rehearing Cross Exh. 6P at Bates 200332, 200333, 200360, 20032, 200363.

3) Virtual collocation of CLEC line cards eliminates any purported maintenance and administrative difficulties.

SBC/Ameritech claims that allowing CLECs to own and place line cards n the NGDLC creates a host of administrative problems. However SBC/Ameritech witnesses acknowledged that all of these alleged problems are eliminated if CLECs virtually collocate line cards. In a virtual collocation arrangement, CLECs would purchase line cards for the Project Pronto NGDLC, but would sell the cards to SBC/Ameritech for a nominal amount such as $1. SBC/Ameritech then manages the CLEC line cards (including providing maintenance services) as part of its own inventory. SBC/Ameritech CTO Ross Ireland agreed that limiting CLECs to virtual collocation would likely resolve SBC/Ameritech's concerns about CLEC collocation of line cards. Rehearing Tr. (Ireland), at 320:6-18.

F. Keown cost analysis is completely unfounded

SBC/Ameritech claims that the Commission's order in this case below will cause it to incur hundreds of millions of dollars to implement. However, the cost estimate relied by SBC/Ameritech is completely inadequate and flawed. The so-called "cost analysis" was done within two weeks by Mr. Keown, who has never done a regulatory embedded cost analysis nor a TELRIC analysis. Rehearing Tr. (Keown), at 2184:18-22, 2202:15-16. Furthermore, Mr. Keown did not even ask for assistance from SBC's costing experts. Rehearing Tr. (Keown), at 2187: 7-9. Mr. Keown's "analysis" does not reflect the real-world conditions under which unaffiliated competitors would make use of the Project Pronto facilities. Further, the "cost analysis" is based on grossly unreasonable premises. Mr. Keown openly admitted several times on cross-examination that his estimates were based on worst case assumption for nearly all of the cost factors. Further, in other places, Mr. Keown's supporting material is so poorly documented that it is practically meaningless; certainly, his documentation falls far short of any reasonable

standard of proof. Therefore, the Commission should dismiss his claims as meaningless speculation.

1. Mr. Keown' Only Used Worst Case Assumptions in His Cost Analysis

Mr. Keown's cost assumptions are conceptually flawed and utterly lacking in support. For instance, in Mr. Keown's most extreme example, he asserts that a competitor that ordered an unbundled PVP would necessarily consume a full third of the capacity of one of the Next Generation Digital Loop Carrier ("NGDLC") RTs that SBC/Ameritech will deploy as part of Project Pronto. SBC/Ameritech Rehearing Keown Exh. 10.0, at 12. Mr. Keown admitted that in his analysis of CLECs' use of the PVP, he "look[ed] at the Commission's order and look[ed] at the range of possibilities and then asked what is the worst thing that can happen to [SBC/Ameritech] on a business case basis for Project Pronto." Rehearing Tr. (Keown), at 2189:14-18. In addition, he also used a worse case scenario for CLEC card ownership. Namely, he assumed that at every RT there would be a CLEC asking to collocate its line card. Rehearing Tr. (Keown), at 2190:13-15. Mr. Keown repeatedly used a worst case scenario in establishing each of his assumptions in his report to management. This is despite the fact that he agreed that SBC does not normally employ worst cases in its decision making process. Rehearing Tr. (Keown), at 2313:11-2316:4. Thus, his motivation for assuming the worst case in each assumption can only be seen as a purposeful attempt to create a hyper-inflated cost estimate with which to scare the Commission.

Further, Mr. Keown's frequent claims that he used a worst case scenario so that someone could then apply percentages to back out costs to more accurately reflect reality rings false. Indeed, Mr. Keown had to admit to Hearing Officer Woods that SBC/Ameritech never provided such percentage calculations to the Commission. Rehearing Tr. (Keown), at 2316:9-15.

1. The Assumptions Underlying Mr. Keown's Cost Analysis Are So Fundamentally Flawed As To Be Meaningless.

In Attachment JEK-4, Mr. Keown provides a list of his assumptions underlying his cost analysis for implementation of CLEC-owned line cards, [SBC/Ameritech Rehearing Keown Exh. 10.0, at 1], which represent the total basis for his cost assertions. Rehearing Tr. (Keown) at 2184:1-8. Yet, each of these assumptions is so substantially flawed that any one of them could render the cost study nearly worthless.

First, in Mr. Keown's Assumption No. 1, he assumes that each CLEC will have at least one customer in each serving area interface, or SAI, with the same type of xDSL service. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. To arrive at this assumption, Mr. Keown started with the number of CLECs xDSL customers per central office. Rehearing Tr. (Keown), at 2171: 8-10. The number of CLEC xDSL customers per CO was derived from a chart from TeleChoice. SBC/Ameritech Rehearing Keown Exh. 10.1, Attachment JEK-R3; Rehearing Tr. (Keown), at 2171:11-16. However, Mr. Keown admitted that he used the TeleChoice numbers without taking into account the fact that these numbers included non-line shared xDSL services. Rehearing Tr. (Keown), at 2173:22-2174:12. He affirmatively left in all forms of xDSL, including non-line sharing flavors, because if he "back[ed] [all but ADSL] out, [the number of CLECs with one customer per SAI] gets even smaller. So instead of being one line per SAI, it [would go] down to something minuscule." Rehearing Tr. (Keown), at 2174:5-8. Moreover, even Mr. Keown agreed that the resulting "minuscule" number would drop even lower if he had backed out ADSL service that did not ride the NGDLC architecture. Rehearing Tr. (Keown), at 2175:1-6. On the stand, Mr. Keown acknowledged that when his figures were modified to account for central office based xDSL services, the number of CLEC customers on Project Pronto per SAI would equal approximately 0.3 – a number far smaller than one customer used in

his assumptions. Rehearing Tr. (Keown), at 2175:19-2176:6. Even if the CLEC demand tripled to 0.9, there would still be less than one CLEC customer per SAI. Further, Mr. Keown did not consider the fact that, even assuming an average of one CLEC customer per SAI, each CLEC would only occupy one card slot per SAI. Rehearing Tr. (Keown), at 2177:4-7. Importantly, Mr. Keown admitted that he was attempting to capture the worst case scenario. Rehearing Tr. (Keown), at 2192:22-2192:3, 2193:22-2194:2. Despite these serious defects in the underlying numbers, Mr. Keown continued to assert that this was the best data he could offer to support this "worst case" assumption. Rehearing Tr. (Keown), at 2177:19-22. Incredibly, Mr. Keown admitted that he did not even try to obtain more accurate numbers. Indeed, he neither asked SBC's internal business development personnel who routinely do competitive analysis for help, nor TeleChoice about their data. Rehearing Tr. (Keown), at 2178:1-15.

Second, Mr. Keown's Assumption No. 2 provides that each CLEC will have two customers in each SAI with different types of xDSL service. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. Again, according to Mr. Keown this is the worst case assumption. Rehearing Tr. (Keown), at 2194:20-21. Further, he uses examples of xDSL that are not relevant to line sharing. Rehearing Tr. (Keown), at 12-16.

Third, Mr. Keown's Assumption No. 3 calls for the number of CLECs to vary between 2 and 5. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. He then randomly chose to use 5 CLECs in his analysis so that it would represent the worst case assumption. Rehearing Tr. (Keown), at 2198:3; 2198:8-10. Mr. Keown claimed he used the number 5, because, when he "looked [at] some of the NPRMs, the more recent NPRM from the FCC, there were several CLECs that expressed a desire to do card level collocation. Rehearing Tr. (Keown), at 2197:5-7.

He had no other basis for developing the range of 2 to 5 CLECs. Rehearing Tr. (Keown), at 12-14.

Fourth, SBC/Ameritech's Assumption No. 5 holds that "Slots used by CLECs only serve one SAI," and Assumption No. 7 holds that no cross connect facility exists at the RT. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. Thus, any particular slot is assumed to be hardwired to feeder pairs that go to the same SAI, precluding a CLEC with four customers at an RT from serving all four with a single quad card. Rehearing Tr. (Keown), at 2200:6-16. Yet, this assumption does not consider the simplest solution: the use of a cross connect field at the RT which would allow one quad card to serve one pair to each of the four SAIs. Rehearing Tr. (Keown), at 2201: 3-10. Mr. Keown did not even attempt to consider cross connect facilities, although he admitted they exist at some RTs. As discussed fully above, a cross connect field could be easily and inexpensively ($2,000 to $2,500) added to SBC/Ameritech's RTs, and **BEGIN CONFIDENTIAL ***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***** END CONFIDENTIAL.** However, Mr. Keown never compared the costs of adding a cross connect to RTs with this worst case assumption to determine the cost difference. Rehearing Tr. (Keown), at 2201:11-21, 2211:22-2212:8.

Fifth, Mr. Keown's Assumption No. 6 assumes "Alcatel nine bank config[uration]." SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. Here, Mr. Keown based his calculations on SBC/Ameritech's standard cabinet configuration, which can accommodate only three fully loaded channel bank assemblies for ADSL lines, despite the fact that he was aware that in huts and CEVs more than three CBAs for ADSL can be supported. Rehearing Tr. (Keown), at 2210:7-12. Project Pronto NGDLCs will reside in all three types of housings, yet, Mr. Keown failed to account for this, and even admitted that he could have done a weighted average to

reflect the fact that CEV to hut located Litespans can actually handle more than three CBAs worth of cards. Rehearing Tr. (Keown), at 2207: 1-6. Such a modification would have been simple since the data were readily available, as demonstrated by SBC/Ameritech's response to Covad/Rhythms/Sprint 9th Set of Data Requests, Data Request 24. However, Mr. Keown claimed that the comparison of cabinets to CEVs and huts would not have been significant. Rehearing Tr. (Keown), at 2210:20-2211:7. Because, according to Mr. Keown, varying his calculations was worthwhile only if it would change the calculations by 25% or more. Rehearing Tr. (Keown), at 2211:1-11. Further, the assumption neglects to consider that Alcatel supports ADLU cards installed outside in more than three CBAs. Rehearing Tr. (Keown), at 2207: 7-11. Although Mr. Keown claimed to have been unaware that Alcatel supports ADLU cards in more than three CBAs, he admitted that he was aware the Alcatel witness, Dr. Ransom, testified that Alcatel supports 300 additional DSL services in more than three CBAs even in a Litespan 2016 cabinet. Rehearing Tr. (Keown), at 2207:10-11, 2207:19-2208:2.

Sixth, Assumption No. 8 assumes that once a card is installed, one hundred percent of the slot is occupied. SBC/Ameritech Rehearing Keown Exh. 10.0 at 1; Rehearing Tr. (Keown), at 2213:10-18. In other words, because Mr. Keown has already assumed that there is only one customer per SAI and that pairs are hardwired only to one SAI, once a CLEC card is placed, 75% of the ports per card are lost and 100% of the slots are lost. Rehearing Tr. (Keown), at 2213:10-2214:2. This assumption makes little sense. This assumption is based on the use of a quad card, one that will not be available until Release 11.0 is available. Rehearing Tr. (Keown), at 2214:3-5. Ironically, Mr. Keown considers it reasonable to assume the use of quad cards in estimating the costs of the Commission's order, but does not consider it reasonable to assume Release 11.0 when discussing more than one PVP for CBAs (discussed in detail above).

Rehearing Tr. (Keown), at 2214:9-21. Further, Mr. Keown makes this assumption that three out of the four feeder pairs are idle, because SBC/Ameritech is assumed to have wired out feeder pairs to the back of cards four at a time. Rehearing Tr. (Keown), at 2216:2-10. However, Mr. Keown neglects to consider that the four feeder pairs are idle only out to the SAI. Rehearing Tr. (Keown), at 2216:11-13. Moreover, Mr. Keown did not account for options for CLEC card sharing and card pooling discussed in detail above, although he was aware of such options. Rehearing Tr. (Keown), at 2216:11-2217:6.

Seventh, Mr. Keown's Assumption No. 9 adds an expense trailer of *****SBC/AMERITECH CONFIDENTIAL** XXX **END CONFIDENTIAL*****. SBC/Ameritech Rehearing Keown Exh. 10.0P, at 1. **BEGIN CONFIDENTIAL***** XX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXX*****END CONFIDENTIAL** Rehearing Tr. (Keown), at 2340:5-17.

Eighth, Assumption No. 10 assumes that fiber must be deployed for Project Pronto RTs even though there is already deployed fiber in place for some new RTs. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. However, Mr. Keown admitted that he ignored his own assumption that there may indeed be sites where fiber already exists when determining the cost of deploying fiber to support Project Pronto UNEs. Rehearing Tr. (Keown), at 2221:20-2222:3.

Ninth, in Assumption No. 11, SBC/Ameritech assumes that it will have to replace 100% of the xDSL capacity used by the CLECs. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. Yet, Mr. Keown was very clear that he took no account of expected xDSL take rates for CLECs. Rehearing Tr. (Keown) at 2224:3-5. Clearly CLECs account for only a small percentage of

overall xDSL take rates. Thus, Mr. Keown did not consider whether SBC/Ameritech would even need the capacity used by the CLECs, he simply assumed that 100 percent of the capacity would be used by CLECs and have to be replaced. Rehearing Tr. (Keown), at 2223:13.

Tenth, Mr. Keown, in Assumption No. 12, assumes that every CLECs will always buy and own their line cards, even AADS. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1; Rehearing Tr. (Keown), at 2225:16-17. However, AADS is only purchasing SBC's Broadband Service, and thus will not own its own cards. Rehearing Tr. (Keown), at 2226:2-7. Mr. Keown admitted that his assumption does not account for the lack of card ownership by AADS, by far the CLEC with the largest xDSL volume. Rehearing Tr. (Keown), at 2226. His assumption also fails to account for other CLECs that purchase the Broadband Service. Rehearing Tr. (Keown), at 2225:13-17.

In addition, Assumption No. 12 assumes that there will be one PVP per CLEC and that three CLECs would consume the entire capacity of channel bank assemblies in each Project Pronto RT. Rehearing Tr. (Keown), at 2228:15-18. As discussed above, when Release 11 is available at the end of August, each channel bank assembly will be able to support multiple PVPs; thus, this asserted capacity constraint is eliminated. Mr. Keown did not consider the availability of Release 11.0 supporting multiple PVPs per channel bank assembly in his cost analysis even though he admitted he knew that Release 11 was about to be released. Rehearing Tr. (Keown), at 2214:9-21.

Finally, Assumption No. 13 assumes capacity exhaust due to CLECs purchasing PVPs, and line card collocation at 50 percent of SBC/Ameritech's RTs. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1. Mr. Keown admitted that he had no fact basis for this assumption whatsoever. Rehearing Tr. (Keown), at 2230:18-20. According to Mr. Keown, SBC/Ameritech

was not sure exactly how CLECs would use the PVP, and so, instead of asking CLECs via survey, SBC/Ameritech randomly selected one half of the RTs. Rehearing Tr. (Keown), at 2229:10-12; 2230:10-12. Moreover, Mr. Keown admitted that the 50% card ownership assumption was a worst case basis, despite the fact that he was aware that AADS was purchasing the Broadband Service would not be owning line cards. Rehearing Tr. (Keown), at 2231:16-17; 2231:20-2232:4. It appears that the only basis for this assumption was Mr. Keown's review of the number of CLECs that filed comments on the FCC's NPRMs. Rehearing Tr. (Keown), at 2233:4-7; 2233:13.

Moreover, Mr. Keown's assumption is inherently contradictory. Because Mr. Keown intends the 50% assumption to reflect the percent of all available PVPs that competitors will order, then, to be consistent with the remainder of his assertions, Mr. Keown would necessarily be assuming that competitors will choose to spend the equivalent of a ***** SBC/AMERITECH PROPRIETARY** XXXXXXXXXX **END SBC/AMERITECH PROPRIETARY***** investment to pre-position high-capacity business services (*i.e.*, services with greater capacity or reliability than AADS' ADSL) in the primarily residential neighborhoods in which SBC/Ameritech allegedly intends to deploy Project Pronto. That analysis is entirely inconsistent with Mr. Keown's assumption that competitors would cause this level of additional cost by serving only one residential customer per area. Moreover, if that were Mr. Keown's assumption, competitors would be paying SBC/Ameritech TELRIC based rates for the PVPs they ordered. Hence, it is a complete misrepresentation to assert that this amount would be an additional cost to SBC/Ameritech. Instead, Mr. Keown's analysis would actually show that competitors will absorb half of SBC/Ameritech's capital costs to deploy its new facilities in Illinois. Thus, Mr.

Keown's analysis grossly exaggerates both the nature and magnitude of the costs that SBC/Ameritech would incur.[42]

2. Mr. Keown's Illinois-Specific Assumptions Are Seriously Flawed.

First, despite the fact that Mr. Keown could have used Illinois-specific investment figures, Mr. Keown chose to assume, in Assumption No. 14, that the under-utilization rate in Illinois was comparable to SBC's. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1; Rehearing Tr. (Keown), at 2236: 5-7.

Second, in Assumption No. 17, Keown's costs estimates for Illinois are neither based on budget numbers or actual expenditures, but instead are based on a "composite of what we felt, some actuals and then some model costs." Rehearing Tr. (Keown), at 2238:7-13. Further, SBC/Ameritech's "actual numbers" are not accurate. **BEGIN CONFIDENTIAL***** X XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXX*****END CONFIDENTIAL** Rehearing Tr. (Keown), at 2392:1-12; 2393:6-10.

Third, Assumption No. 18 assumes that SBC/Ameritech will have to hire an additional 31 full-time personnel to handle manual assignments of slots if CLECs can collocate line cards in the NGDLC. SBC/Ameritech Rehearing Keown Exh. 10.0, at 1; Rehearing (Keown), at 2241:18-22. Yet, Mr. Keown admitted that this figure represents a double counting, given that he also provided an estimate for the required OSS upgrade for a mechanized system. Rehearing Tr. (Keown), at 2242:1-6; 2242:21-22. Moreover, this assumption preposterously assumes the worst case, namely that the CLECs will have orders in every single RT in Illinois in every slot in

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[42] If Mr. Keown's cryptic note does not mean that he assumed competitors would order 50% of all available PVPs, then the decision to assign 50% of the total capital cost for the project to competitors makes no sense.

the three channel bank assemblies. Rehearing Tr. (Keown), at 2244:3-11. Further, Mr. Keown could not account for the assumption that assignments would take 16 minutes per slot. [43] Rehearing Tr. (Keown), at 2246:4-6.

The assumptions on OSS don't end there. Assumption No. 21 adds the cost estimates for mechanizing the OSS for CLEC-owned line cards, which as noted above, Mr. Keown admits were double counted. What is truly incredible is that, in this Assumption, Mr. Keown has saddled Illinois with the cost estimates for the OSS mechanized upgrades for all of the thirteen states within SBC's serving territory. Rehearing Tr. (Keown), at 2257:11-20. SBC is working on an integrated OSS upgrade for its 13 states. Rehearing Tr. (Waken), at 2626:3-8. Thus, Mr. Keown nonchalantly assumes that the total cost for all of SBC's ILEC should be applied to Illinois, because that is the worst case. Rehearing Tr. (Keown), at 2259:19-22.

Similarly, in Assumption No. 19, SBC/Ameritech assumes that placement of CLEC line cards will not only require a trip to each and every of the 2090 RTs for each and every slot, but inexplicably, each of the orders will require its own truck roll. Rehearing Tr. (Keown), at 2248: 19-22; 2250:9-13. There is no consideration of including normal, common sense practices, such as having the trucks carry more than one CLEC card at a time. Rehearing Tr. (Keown), at 2251:6-14.

3. Mr. Keown's Cost Analysis Ignores The Fact That This Commission Will Set TELRIC-Based Rates for CLECs' Line Sharing Over The NGDLC Architecture.

Mr. Keown's complaints about the potential cost to SBC/Ameritech of the Commission-ordered unbundling all depend on an implicit presumption that the Commission will set the price for those options so that it does not cover SBC/Ameritech's forward-looking economic cost.

[43] Similarly, Mr. Keown could not did not have support for the numbers provided in Assumption No. 20 concerning help desk needs. Rehearing Tr. (Keown), at 2255:11-2256:2.

Proper TELRIC-based prices for unbundled access to Project Pronto will fully compensate SBC/Ameritech for the costs of its investment, eliminating the basis for Mr. Keown's objections. Covad/Rhythms Murray Rehearing Exh. 3.0, at 13-14.

Thus, if Mr. Keown's foundational assertions are correct, SBC/Ameritech should have no fear that competitors such as Covad and Rhythms will order the unbundling options that the company considers to be onerous. Covad/Rhythms Murray Rehearing Exh. 3.0, at 14. Uneconomic alternatives will be equally unappealing to competitors as SBC/Ameritech claims that they are for itself.[44] For example, in the residential neighborhood situations that SBC/Ameritech claims will be the focus of Project Pronto, competitors will be unlikely to sell any more dedicated bandwidth high-volume services than would SBC's advanced services subsidiary. Covad/Rhythms Murray Rehearing Exh. 3.0, at 14. Certainly, any competitor that purchased a large portion of the capacity of an NGDLC remote terminal to serve residential customers with ultra-high bandwidth (*i.e.*, more bandwidth than is available through ADSL) or premium services either will not be in business for long or, if successful, will demonstrate that SBC/Ameritech is radically undersizing its Project Pronto deployment relative to residential demand for high-bandwidth services.

Mr. Keown's attempt to paint this possibility as a serious issue for deployment of NGDLC technology in residential areas is unrealistic. A more likely scenario is that competitors would only be inclined to provide higher or dedicated bandwidth services in any quantity where

[44] The SBC subsidiary that is responsible for providing DSL-based services, AADS, has been notably silent concerning the attractiveness of the options that SBC/Ameritech is making available. The logical conclusion for the Commission to reach from this silence is that SBC/Ameritech has designed its Wholesale Broadband Service to be a wholesale version of the retail service that its supposedly arms'-length affiliate wishes to offer. SBC/Ameritech has not designed bundled wholesale services that are tailored to the marketing plans of unaffiliated competitors such as Covad and Rhythms. Thus, it is painfully clear that any reversal of the Commission's decision to require unbundled access to SBC/Ameritech's Project Pronto facilities would favor AADS over other DSL providers.

a substantial numbers of potential customers are located, which is also where SBC/Ameritech is likely to plan on deploying higher-capacity facilities for its own use. Covad/Rhythms Murray Rehearing Exh. 3.0, at 15-16.

Further, Mr. Keown failed to assume that the Commission would correctly apply TELRIC-based pricing principles to the "facts" on which he relies. Specifically, given Mr. Keown's assertion that a competitor placing a new type of card to provide a novel xDSL-based option would necessarily consume four portions of the total potential xDSL capacity of an NGDLC remote terminal, he should have assumed that the Commission would set the price for that option to recover the cost of those four channels. Covad/Rhythms Murray Rehearing Exh. 3.0, at 19.

Given proper TELRIC-based prices, if system exhaust were to occur, it would not be "premature" exhaust, as Mr. Keown uses that term. Instead, exhaust would occur at the point when SBC/Ameritech is being compensated for the full use of the RT facilities that it has deployed. Covad/Rhythms Murray Rehearing Exh. 3.0, at 19. SBC/Ameritech would receive sufficient compensation to justify investment in additional facilities if there were unmet demand.

Mr. Keown's entire analysis is based on presumption that competitors will use SBC/Ameritech's Project Pronto facilities in a less efficient manner, resulting in lower overall utilization, than was assumed in some SBC base case. Covad/Rhythms Murray Rehearing Exh. 3.0, at 19. That base case is presumably the deployment of Project Pronto as SBC/Ameritech originally intended to use it in rolling out its own xDSL-based services, which SBC/Ameritech is now treating as the presumed use of the service by its affiliate AADS.

This fundamental presumption that competitors other than AADS would make less efficient use of the capacity that they purchase, whether in the long run or even a relatively short

run, is unfounded. Moreover, it is inconsistent with the repeated SBC/Ameritech claim that Project Pronto is entirely an overlay network. This claim implies that the SBC/Ameritech investment will be entirely idle at first and will fill up slowly as demand for xDSL-based services develops and is met. Covad/Rhythms Murray Rehearing Exh. 3.0, at 20.

Given that context, a more reasonable presumption is that unbundled access and desirable options for unaffiliated competitors will help SBC/Ameritech utilize its Project Pronto investment more rapidly and therefore shorten the payback period for the investment.

An additional flaw in Mr. Keown's assumption is that one might just as easily presume that competitors are likely to be more cash constrained than an SBC affiliate and hence even more cost-conscious than AADS is likely to be. Covad/Rhythms Murray Rehearing Exh. 3.0, at 20. Other competitors would therefore likely use Project Pronto facilities more judiciously than would AADS. If one applies Mr. Keown's basic logic, that scenario would result in a *decrease* in the necessary investment for Project Pronto relative to the investment required absent an unbundling requirement. Covad/Rhythms Murray Rehearing Exh. 3.0, at 20-21.

The above examples represent the most extreme examples of Mr. Keown's failure to support his claims, but they are not far from being representative of quality of documentation for the cost study as a whole.[45] Mr. Keown has presented so little support for the basis of this supposedly project-stopping cost that it is impossible to perform a meaningful analysis, let alone to determine if the alleged costs have any basis in reality.

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[45] For example, among the numerous other problems with Mr. Keown's documentation and support is that it is not possible to readily determine if his analysis takes account of ***** SBC/AMERITECH ATTORNEYS' EYES ONLY CONFIDENTIAL** the apparent reduction in SBC/Ameritech's cost to deploy Project Pronto due to declines in the input cost for fiber. *** **END ATTORNEYS' EYES ONLY CONFIDENTIAL.** SBC/Ameritech response to Rhythms/Covad/Sprint Data Request 1-1.

Hence, it would be unreasonable if the Commission allows SBC/Ameritech to escape its obligation to provide unbundled access to its loop plant by claiming that it is now too costly to redesign its processes to support unbundling. The record of this proceeding shows that SBC/Ameritech was aware that it might have to unbundle Project Pronto, yet deliberately designed its Project Pronto network architecture to exclude meaningful unbundling options. Ameritech Ireland Rehearing, Exh. 1.0, at 7-8. Indeed, up to and even after the time that SBC made its public commitment to Project Pronto, the company anticipated that it would need to offer the components of Project Pronto as unbundled network elements and that it might have to permit competitors to own and place their own line cards in the NGDLC remote terminals that SBC planned to deploy as part of its Project Pronto investment. SBC/Ameritech should now bear the financial consequences of that decision. Any claims by SBC/Ameritech at this late stage that it would cost any considerable amount to build unbundling capabilities into its network are entirely inappropriate. Instead, the relevant showing, which SBC/Ameritech has not even attempted to make, is what, if any, additional cost the company would have incurred to build reasonable unbundling capabilities into its planned network enhancements from the start.

SBC has knowingly pursued an investment strategy that is inconsistent with the clear policy objectives that regulators have laid out for more than a decade and that are reaffirmed in the Act. Thus, any costs that SBC/Ameritech must now incur to back unbundling capabilities into its systems are costs that SBC/Ameritech should bear as the price for attempting to circumvent the spirit and letter of the regulations designed to help open its markets to competition.

G. SBC/Ameritech failed to prove there will be substantial costs to modify its OSS to support collocation of CLEC line cards

Mr. Waken provides no support, or any basis, at all to support his assertions that it would cost between $95 and $123 million to modify SBC/Ameritech's existing OSS to allow for inventory of line cards. Rhythms' Rehearing Exh. 1.0, at 27. By his own admission, Mr. Waken's estimates "have not been validated by any of SBC's software vendors" and thus are merely Mr. Waken's guesses. It appears that Mr. Waken's guesses are overstated. *Id.* SBC already has the capability to inventory different types of line cards used to provide different services (e.g. POTS, ISDN etc). Id. SBC's OSS already can inventory **BEGIN CONFIDENTIAL*****XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXX *****END CONFIDENTIAL**. Rhythms' Hamilton Rehearing Cross Exh. 3P at 27-29 30 36. The document indicates that inventory of ADSL line cards is currently **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXX*****END CONFIDENTIAL**. Adding one field of information to track the CLEC owner of line cards, especially **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX***** END CONFIDENTIAL** is a straightforward work effort that should cost no where near the $100 million guess of Mr. Waken. Rhythms' Rehearing Exh. 1.0, at 27. It should be noted that the entire OSS modifications for implementing line sharing in multiple OSS cost only **BEGIN CONFIDENTIAL***** XXXXXXXXXXX *****END CONFIDENTIAL.** Rhythms' Hamilton Rehearing Cross Exh. 2P. It seems very unlikely that adding one field of information to track

CLEC ownership of line cards, even in multiple OSS, could cost more than **BEGIN CONFIDENTIAL ***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX *****END CONFIDENTIAL** Finally, almost all of the asserted inventory costs disappear with the CLEC card pooling arrangement discussed above. For all of these reasons, Mr. Waken's estimate for the cost to inventory CLEC-owned line cards is seriously exaggerated, and the Commission should give it no weight.

VI. THE WEIGHT OF EVIDENCE DEMONSTRATES AMERITECH MUST GIVE CLECS DIRECT ACCESS TO ALL TECHNICAL LOOP INFORMATION AND OSS FUNCTIONALITY

The undisputed evidence in this case shows that CLECs are disadvantaged by being denied direct access to SBC/Ameritech's OSS. The Commission has already recognized this fact three times before, and SBC/Ameritech has introduced no new evidence to the contrary. SBC/Ameritech strongly resists giving CLECs such access. As the evidence in this case makes clear SBC/Ameritech currently has sole discretion in deciding what information CLECs may access, and so long as SBC/Ameritech has the sole control over OSS data and functionality, CLECs will always be one step behind SBC/Ameritech's own operations. Rehearing Tr. (Waken), at 2562:10-2563:2.

As discussed in detail below, SBC/Ameritech has available a range of technical loop information and OSS functionality for its employees but to which CLECs are denied access. Direct access will ensure that CLECs get access to all of the loop provisioning information and functionality to which they are legally entitled. Further, direct access will ensure that CLECs get access to all of the information made available to SBC/Ameritech in the same timeframe as the ILEC employees and will enable CLECs to perform manual loop qualifications themselves, thereby avoiding the expensive manual loop qualification charges SBC/Ameritech imposes. SBC/Ameritech opposes direct access and has conjured up a long list of horribles it claims will

occur if CLECs get access. Even SBC/Ameritech witness Mr. Waken testified that if worked for a CLEC, he would want to have the option of using direct access and gateways to access loop information. Rehearing Tr. (Waken), at 2574:10-19. However, SBC/Ameritech has failed to provide any evidence to support those claims in this proceeding or the previous three proceedings in which the Commission examined the direct access issue.

A. SBC/Ameritech is attempting to avoid its legal obligations by revising the definition of OSS to which CLECs are entitled

SBC/Ameritech once again raises the same frivolous argument that OSS are defined only as front-end GUIs and gateways, and not the ILECs' databases and systems. The Commission has thoroughly evaluated, and rejected this argument three times. The express language of the FCC's UNE Remand Order defines to include OSS databases and computer systems. SBC/Ameritech has not, and could not, prove otherwise in this proceeding. Indeed, the only new evidence submitted on this issue (internal SBC documents) strengthen the CLECs' position that OSS includes databases and computer systems, and therefore CLECs are entitled to access the data and functionality of these systems.

1. SBC's revised definition of OSS is directly contrary to the UNE Remand Order

The FCC defines such OSS broadly to include records, mechanized backend systems and databases (and the information contained therein), gateways and interfaces used to support pre-ordering, ordering, provisioning, testing and maintenance and billing for xDSL services. UNE Remand Order, at ¶ 425. Thus, SBC/Ameritech is legally obligated to give CLECs non-discriminatory access to all such OSS so that CLECs may determine what type of DSL is suitable for a loop (pre-ordering), place orders for the CLEC's chosen type of xDSL service into the Ameritech Illinois' systems to be processed and have the line-shared loop provisioned, tested, and repaired as quickly as possible. Further, the ILEC must make available to the CLEC

any information available any loop information available to any ILEC employee. The FCC stated, “under our existing rules, the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbents’ back office and can be accessed by any of the incumbent LEC’s personnel.” *Id.* ¶ 430.

Despite this clear directive from the FCC, Mr. Mitchell and Mr. Waken continue to argue that SBC/Ameritech must only give CLECs access to all OSS, not just front-end GUIs and gateways. Rehearing Tr. (Mitchell), at Rehearing Tr. 1644:20-1650:11; (Waken), at 2517:14-2518:9. Even when confronted with the actual language of the FCC’s UNE Remand Order defining OSS as including databases and computerized systems, Mr. Mitchell continued to argue to the contrary, although he eventually conceded that it appears the FCC identified GUIs and gateways as the means by which a CLEC would access information in the ILECs’ OSS, and that “it’s very possible” his understanding of the FCC’s order may not be correct. Rehearing Tr. (Mitchell), at 1648:2-1650:14; 1659:9-15.

2. SBC/Ameritech’s internal documents contradict the revised definition of OSS as only front-end GUIs and gateways

The contract that SBC/Ameritech signed with Telcordia, for software modifications necessary to support line sharing provides further proof that the new minted definition of OSS is incorrect. In that contract, Telcordia, which is one of SBC/Ameritech’s oldest and largest software vendors (having previously been part of the Bell system as BellCore) **BEGIN CONFIDENTIAL***** XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

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Similarly, the contract that SBC/Ameritech signed with Alcatel, its sole vendor for hardware and software for NGDLC, demonstrates that SBC/Ameritech's revised definition of OSS is incorrect. That contract stated **BEGIN CONFIDENTIAL***** "XXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX
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Finally, a recent letter sent in June from Willena Slocum informed Rhythms that its customer records "in its OSS" may have been accessed by other CLECs or SBC's retail

representatives. Rhythms' Mitchell Rehearing Cross Exh. 1. Mr. Mitchell conceded during cross examination that gateways and GUIs such as Verigate do not store customer records. Rehearing Tr. (Mitchell), at 1749:3-11. Thus Mr. Mitchell's definition of OSS as front-end systems only contradicts Ms. Slocum's definition of OSS. Mr. Mitchell refused to concede that his definition of OSS is incorrect and instead claimed that Ms. Slocum have misinterpreted the definition of OSS. Id. at 1749:12-16.

Despite these repeated references in important documents defining OSS to include backend systems and databases, Mr. Mitchell refuses to accept the clear truth. His definition is not consistent either with the FCC's *UNE Remand Order* or his company's own internal documents. Mr. Mitchell's claim that everyone else is wrong is not credible and should be given no weight.

3. SBC/Ameritech revised its definition of OSS only after the FCC issued the UNE Remand Order so SBC/Ameritech could avoid legal OSS obligations to CLECs

SBC/Ameritech's OSS expert Mr. Waken testified that the ILEC redefined OSS after the FCC issued the UNE Remand Order giving CLECs access to ILECs' OSS. Rehearing Tr. (Waken), at 2517:1-13. He stated that the term OSS has been used for years to refer to all types of databases and systems, including what Mr. Waken now defines as back office systems, or "BOS," a term SBC/Ameritech coined for regulatory purposes. Id., at 2516:16-19; 2518:10-18. However, after the FCC's UNE Remand Order was issued, SBC/Ameritech began "to try and put a box around" the systems for which they wanted to exclude CLEC access. Id. at 2516:21-2517:13.

The Commission should not allow SBC/Ameritech's attempt to define away its legal obligations to give CLECs access to all of its OSS (i.e., its databases and systems) that contain technical loop information. SBC/Ameritech witnesses admit that the term OSS has been used for

years to refer to the ILECs' databases and computer systems such as LFACS, SWITCH and TIRKS. See Rehearing Tr. (Mitchell), at 1655:5-18. As discussed above, that definition is clearly what the FCC had in mind when it used that term in the UNE Remand Order. See ¶ 425. Therefore, the Commission should give no weight to SBC/Ameritech's argument that OSS includes only front-end GUIs and gateways, and uphold its order requiring CLEC direct access to SBC/Ameritech's OSS, including all databases and systems that contain technical loop information.

B. SBC/Ameritech employees have access to OSS information that CLECs do not have

SBC/Ameritech employees have access to all technical loop information in backend systems and databases, but CLECs are limited only to loop information that is provided to SBC/Ameritech's service representatives, or information that SBC/Ameritech has been ordered to provide. Rehearing Tr. (Waken), at 2556:11-16; 2558:1-11. Indeed, some SBC/Ameritech employees have a "super id," which enables them to access loop data in multiple states. Rehearing Tr. (Waken), at 2589:5-17. Mr. Waken testified that if he worked for a CLEC, he similarly would want to be able to access information from and ILECs' multiple systems from a single PC and single password. Id. at 2592:10-2593:1. As discussed above the FCC's orders entitled CLECs to loop information that is available to any ILEC employee (including engineers) and *not* just ILEC service representatives in the same time and manner. *UNE Remand Order*, at ¶ 428; *First Report and Order*, at ¶ 151.

As an example, the LFACS system is both a database and an assignment system for outside copper loop plant. Rehearing Tr. (Waken), at 2521. LFACs has 100 fields of data, but CLECs get only a subset (less than 51) of those data elements. Rehearing Tr. (Waken), at 2544:12-19; 2545:8-20. Among the data fields that SBC/Ameritech provides to its own

employees, but denies to CLECs are: notifications that the ILEC is about to run out of cable in a particular area; assignment information on terminals, SAIs and RTs, and engineering instructions on how to provision loops when multiple facilities serve a location. Id., at 2541-43. Mr. Waken was unable to identify any harm that providing such information to CLECs could cause. Id., at 2541:22-2542:19.

Rather than providing CLECs direct access to ARES for the purposes of them performing their own loop qualification tests, SBC/Ameritech seeks approval to block such access. Contrary to the FCC's orders, SBC/Ameritech incorrectly believes that it can simply provide the results of any loop qualification tests to CLECs as compared to providing the same direct access it provides itself. Rehearing Tr. (Waken) 2597:10-12. SBC/Ameritech is legally required to provide its OSS to CLECs on a nondiscriminatory basis. Joint CLECs recommend that the Commission require SBC/Ameritech to grant CLECs direct access to ARES and reject SBC/Ameritech proposed charge of $20.00 for a it to perform a manual loop qualification.[46]

In the *First Report and Order*, the FCC concluded that SBC/Ameritech must provide access to its OSS on "substantially the same time and manner" conditions that it provides such OSS to itself. *First Report and* Order, ¶ 518. The FCC specifically clarified that the "definition of OSS includes access to loop qualification information." *UNE Remand Order*, at ¶ 425. The FCC further made clear that its existing rules require SBC/Ameritech to provide CLECs with "nondiscriminatory access to the same detailed information about the loop that is available to the incumbent . . . ." *UNE Remand Order*, ¶ 428. Further, the FCC found "that an incumbent LEC that has manual access to this sort of information for itself, or any affiliate, must also provide

[46] As discussed below, SBC/Ameritech failed to establish that the $20.00 charge is consistent with the TA 96.

access to it to a requesting competitor on a non-discriminatory basis." *UNE Remand Order*, ¶ 430.

The FCC noted that the relevant tests is not whether the "incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel." *UNE Remand Order*, ¶ 431. In other words, SBC/Ameritech must provide CLECs access to ARES because SBC/Ameritech's personnel have access to it.

Mr. Waken stated that SBC/Ameritech's outside plant engineering clerk have access to ARES and that they routinely complete manual loop qualification tests by accessing ARES. Rehearing Tr. (Waken) at 2593:4-16. Mr. Waken went so far as to state that any CLEC employee, if trained, could access ARES and properly conduct a manual loop qualification. Rehearing Tr. (Waken), at 2597:5-7. Nonetheless, ultimately, SBC/Ameritech refused to give CLECs the same direct access that SBC/Ameritech's employees have to ARES. Rehearing Tr. (Waken) at 2597: 2-12. As such, SBC/Ameritech is blatantly violating the *UNE Remand Order*.

As another example, SBC/Ameritech employees have access to the Pronto Construction Administration Tool ("PCAT") system, which identifies, prioritizes and tracks the status of upgrading remote terminals for Project Pronto. Rehearing Tr. (Waken), at 2565. Because CLECs do not have access to PCAT, they may be disadvantaged because PCAT provides the most current accurate information about progress RT construction. Rehearing Tr. (Waken), at 2568:18-22. Therefore, SBC/Ameritech personnel will know immediately when an RT has become available for orders, while CLECs must wait for such information to be returned through some secondary system, if at all.

Further, SBC/Ameritech personnel get more information than do CLECs regarding spare loops. Using the Loop Qual gateway, CLECs can determine the availability and loop makeup of only one loop. Rehearing Tr. (Waken), at 2581:14-2582:8. Using Verigate, CLECs can get the additional information of multiple spare pairs terminating at a particular location. Id. However, the Verigate function does not give CLECs any loop makeup information. *Id.* SBC/Ameritech personnel are not so limited. By directly accessing LFACs, SBC/Ameritech personnel can obtain all technical information about all loops terminating at a particular address. Id., at 2585:3-7. Mr. Waken's testimony contained a six-page printout of the information about the facilities serving a particular street address. Id., at 2585:3-7; Ameritech Rehearing Exh.(Waken), Attachment C. Similarly, SBC/Ameritech personnel can obtain extremely detailed information about the makeup of virtually every loop in Illinois through ARES. Using ARES, a CLEC could do a loop makeup segment by segment real time while sitting at an ARES terminal. Rehearing Tr. (Waken), at 2595:14-21; 2596:16-2597:7. Such loop makeup information includes actual cable length in feet, cable gauge, and cable segments. Id.

Mr. Mitchell testified that LFACS and ARES have loop qualification information, even under his truncated definition. Rehearing Tr. (Mitchell), at 1736:19-1737:1. Mr. Waken's testimony indicates that TIRKS and SWITCH also have loop information. Rehearing Tr. 2515:1-2. However, rather than play a guessing game as to which SBC/Ameritech OSS contain loop information, or provide OSS functionality, the Commission should uphold its decision and allow CLECs to audit SBC/Ameritech's databases and systems to determine for themselves which ones contain loop information that would be useful in provisioning xDSL service. Rhythms' Rehearing Exh. 1.0, at 11. check this page.

SBC/Ameritech currently denies CLECs some technical loop information on the basis that it is irrelevant. Rehearing Tr. (Mitchell), at 1693:17-1694:6. However, SBC/Ameritech should not be allowed to arbitrarily determine what information is relevant for CLECs. Allowing SBC/Ameritech to occupy a gatekeeper role violates the FCC's *UNE Remand Order*, which entitles CLECs to access the underlying loop qualification information contained in its engineering record, plant records and other back office systems so that they "can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer." *UNE Remand Order*, at ¶ 428.

C. SBC/Ameritech employees have access to all OSS functionality of backend systems but CLECs are denied the same capabilities

1. SBC/Ameritech is not giving CLECs access to OSS functionality such as inquiries and reports to assist with analysis of available loops

The evidence in this case also demonstrates that SBC/Ameritech has access to a range of OSS functionality that allows it to analyze and determine the availability and technical characteristics of equipment and facilities in its loop plant such as inquiries and reports in LFACs. Rhythms' Rehearing Exh. 1.0. Such information is inventoried in its backend systems and databases, and by using functionality referred to as reports and inquiries, can search for and analyze "a wide range" of specific data on its loop plant that may be used to assist in provisioning advanced services.[47] CLECs are not allowed to utilize SBC/Ameritech's OSS functionality.

In addition, SBC/Ameritech apparently has the ability to monitor and analyze CLEC purchases of loops by compiling information in its backend systems and databases. Rhythms' Waken Rehearing Cross Exh. 2P. One of the exhibits admitted in this proceeding is a document

[47] Rhythms Texas Exh. 40 (Bates 031325-0031332), at 9-4 to 9-6, 10-2; Exh. 47 (Bates 034235-034507), at 2-5 to 2-6.

from Telcordia detailing a software capability that allows ILEC employees using the LFACS back end system to take advantage of their ability to view all loop data in their backend systems and databases to track and monitor the activities of CLECs. *Id.* The software modifies the LEIS/LEAD, SOAC and LFACS systems to allow the identification of and tracking of facilities that are purchased as UNEs by CLECs.[48] This capability allows ILECs to "monitor and analyze the impact of the CLEC's involvement in the ILEC's region."[49] The document goes on to state that the benefit of the software modification is "to build a historical reports database which will allow the ILEC to develop market and engineering strategies" based on data in LFACs.[50] Indeed, the system apparently uses a special "tag" to denote CLEC loops so that they can be traced. The document states:

> The LEIS/LEAD system is being enhanced in Release 15.0 to provide reporting identifying the geographical areas targeted by other service providers. The LEIS/LEAD system will be enhanced to build a historical records database which will allow the ILEC to develop market and engineering strategies. LFACS will be used by the LEIS system as a data source. This feature will allow SOAC to send the appropriate tags and values from the service order to LFACS which will allow the LEIS/LEAD system to monitor and analyze the impact of the CLEC's involvement in the ILEC's region.[51]

Further, the purpose of the modification to LEIS/LEAD is stated even more bluntly in another Telcordia document. That document, entitled "LEIS/LEAD Detailed Requirements to Support Loop Unbundling," states:

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[48] Rhythms Texas Exh. 19 (Bates 003914-003930), SOAC/DSS Requirements for LEIS/LEAD Release 14.1 and LFACS Release 24.0 Enhancements to Support Loop Unbundling, at 3. All of the material discussed in this section was declassified by agreement when Telcordia, the copyright owner of the document and software, waived confidential treatment of the portions of the document herein cited. *See* letter from Mr. Rex Van Middlesworth to Mr. Steve Bowen, dated Dec. 5, 2000 and excerpts from a post-hearing conference transcript in Texas Docket 22469 in which ALJ Mason confirmed that some portions of the Telcordia document were designated non-confidential in an agreement with Rhythms.

[49] Rhythms Texas Exh. 19 (Bates 003914-003930), at 4.

[50] *Id.* SWBT is presumptively using this software feature now, since SWBT produced the document to Rhythms in response to Rhythms Texas RFI 3-42, which asked for a detailing reporting of all OSS modifications being made to support line sharing.

[51] Rhythms Texas Exh. 19A (Bates 003914-003930), §2.3.

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Mr. Waken did not deny that the Telcordia software was available to SBC/Ameritech. Instead, he claimed that he wasn't sure the software could actually do what Telcordia claimed, and that "[t]here is a lot of service order work … [and] there is a lot of methods and procedures work that needs to be done." Hearing Tr. (Waken), at 2618:17-2619. Mr. Waken testified that that SBC/Ameritech is currently using version 27 of LFACS and version 16.1 of LEAD/LEIS, both several versions beyond the software version in which the "enhancement" described in the Telcordia document was made available. Finally, Mr. Waken testified that SBC/Ameritech was not necessarily permitted to use the tracking "enhancement," but he did not deny that the software "enhancement" had been deployed in SBC/Ameritech. Therefore, the record evidence supports a conclusion that SBC/Ameritech has available the ability to track CLEC loops if it desires to do so.

Thus the evidence submitted in this case confirms SBC/Ameritech's disparate OSS capabilities. Under the non-discrimination and parity provisions of TA96 and the *UNE Remand Order*, CLECs should have access to the same functionality. Allowing CLECs to directly access SBC/Ameritech's OSS will enable CLECs to use these capabilities. The Commission should uphold its order granting direct access for CLECs.

[52] Rhythms Texas Exh. 23A (Bates 003752-003899), at § 2.1

2. CLECs do not have the same flow-through for pre-ordering and ordering as SBC/Ameritech

Mr. Mitchell states incorrectly that CLECs can integrate the EDI ordering gateway currently available from SBC/Ameritech with the EDI/CORBA pre-ordering interface to obtain an integrated pre-ordering and ordering system. Ameritech Rehearing Exh. 9.0 (Mitchell), at 10. Evidence submitted in this case from the SBC Business Rules POR, in which CLECs must attempt to negotiate changes in OSS support provided by SBC/Ameritech demonstrates that Mr. Mitchell is wrong. The most recent issues list from that POR shows that CLECs have been asking for data element synchronization in order to integrate pre-ordering and ordering, but SBC has indicated it disagrees with that request. Hearing Tr. (Mitchell), at 1690:12-18; Rhythms' Mitchell Rehearing Cross Exh. 1, at 2 (Issue 2). Further, the issues list indicates that there may be fields that can't be synchronized between ordering and pre-ordering. Rhythms' Mitchell Rehearing Cross Exh. 1, at 22-23 (Issue 17). When confronted with this documentation, Mr. Mitchell admitted that his testimony may be wrong. Rehearing Tr. (Mitchell), at 1692:20-1693:8. Thus, the evidence in this case demonstrates that CLECs do not have access to an integrated, one-step flow through process for pre-ordering and ordering.

Further, Mr. Mitchell admitted on cross examination that it currently takes CLECs at least three separate steps (address validation, loop qualification, submission of LSR request) to process an order. Rehearing Tr. (Mitchell), at 17409-1741:4. The definition of flow through is generally accepted to be the ability to launch an order and have no human act on it again. Hearing Tr. (Mitchell), at 1742:17-18. However, Mr. Mitchell claims that this three-part process requiring separate continuing human intervention constitutes flow-through because he redefined the term to mean that information is returned once a inquiry is made without further intervention. Rehearing Tr. (Mitchell), at 1744:1-12. Thus, even if the CLEC had to perform 20 separate

transactions to process an order, Mr. Mitchell would consider that to be a flow-through system so long as the CLEC obtained information by hitting the enter key and obtaining an answer without further action. Rehearing Tr. (Mitchell), at 6-12. Such "definition" is the complete opposite of flow-through and the Commission should give Mr. Mitchell's assertion no weight. Mr. Mitchell admitted during cross examination that he does not know what type of flow through processing the SBC/Ameritech's own personnel have. Rehearing Tr. (Mitchell), at 1742:9-14. The Commission should uphold its conclusion that CLECs do not get the same level of flow through as SBC/Ameritech.

D. SBC/Ameritech employees have direct access to backend systems and databases even though CLECs are denied such access

Mr. Waken testified that SBC/Ameritech employees get direct access to all data contained in all of SBC/Ameritech's OSS databases and computer systems. Hearing Tr. (Waken), at 2591. However, Mr. Waken testified that he has never recommended to SBC/Ameritech that it comply with any of the Commission's prior three orders and give CLECs direct access. Rehearing Tr. (Waken), at 2537:4-10. The evidence in this record demonstrates that SBC/Ameritech's OSS databases and computer systems can be directly accessed easily via a PC in terminal emulation mode or via a dumb terminal. Rehearing Tr. (Waken), at 2586:19-2588:21. If direct access is done with a PC in terminal emulation mode, such access may be accomplished from a remote location over dial up access. Id., at 2590:2-17. SBC/Ameritech has security in place for such remote access. Id. at 2590. Therefore, any claim by SBC/Ameritech that direct access is extremely expensive and difficult is untrue, and should be rejected by the Commission.

E. Direct access would eliminate the time lag that CLECs suffer by receiving loop information only through the Loop Qual gateway

Mr. Waken and Mr. Mitchell stated in testimony that Loop Qual, the "front end" system through which CLECs must access loop provisioning data draws such data from LEAD/LEIS. Waken Direct), at Attachment A; Rehearing Tr. (Waken), at 2522:12-15. Mr. Waken indicates that LEAD/LEIS in turn obtains its data from the LFACS database on a monthly basis. Id.; Rehearing Tr. (Mitchell), at 1697:2-6. Therefore, when the real-time source data in LFACS is updated, there is a period prior to the next LEAD/LEIS extract in which the data contained in LFACS is more accurate than data contained in LEAD/LEIS. Rehearing Tr. (Mitchell), at 1697:17-22. Mr. Mitchell admitted during cross examination that if CLECs are restricted to using Loop Qual to obtain loop provisioning information, they may be receiving out of date information compared to LFACS, which may be directly accessed by SBC/Ameritech personnel. Id., at 1697:12-22. Such disparity violates the non-discrimination standards in the Telecommunications Act or the UNE Remand Order's requirement that CLECs receive information in the same time and manner as ILECs. *First Report and Order*, at ¶518.

F. Direct access would eliminate the need for CLECs to pay for expensive manual loop qualification

Mr. Waken testifies that if CLECs directly accessed provisioning information they would be performing "the same manual loop qualification process that would be performed by SBC-Ameritech engineering personnel for CLECs when the mechanized process does not bring back the necessary loop qualification information." Waken Direct, at 18:14-17. SBC-Ameritech wants to charge CLECs $20 for such engineering look ups – a potentially very lucrative business for the ILEC. Rhythms' Rehearing Exh. 1.0, at 25. If CLECs had direct access, they could perform this function for themselves without paying SBC/Ameritech's expensive manual loop qualification charge. Id.

G. SBC/Ameritech failed for the fourth time to prove that its systems would be harmed by CLEC direct access to its backend systems and databases

SBC/Ameritech also resuscitates its argument that direct access by CLECs to SBC/Ameritech will harm its backend systems and databases. Despite a fourth opportunity to present evidence to support its claims, SBC/Ameritech did not submit any proof that direct access would harm its systems. Instead, SBC/Ameritech's witnesses on rehearing largely regurgitate, often verbatim, the testimony of Ms. Jacobson from the October 2000 hearings. The Commission has already dismissed such testimony as speculation. Accordingly, the Commission should again reject Ameritech's unsupported claims.

First, SBC/Ameritech again presented no evidence regarding the capacity of its systems such as LFACs to handle simultaneous transactions. SBC/Ameritech witnesses could not identify the capacity of any of SBC/Ameritech's systems such as LFACS to handle simultaneous inquires or the limit on simultaneous inquiries. Rehearing Tr. (Mitchell) 1718: 20-22; Hearing Tr. (Jacobson) at 877-885. Nor has SBC/Ameritech done any capacity testing of LFACS. Rehearing Tr. (Mitchell) 1720: 19-22; 1721:1-2**.** SBC/Ameritech's paltry showing is not unique to Illinois. In the face of a similarly deficient presentation, Texas arbitrators concluded:

> SWBT failed to provide evidence to support its claim to fail, except to express concern over the number of hits. Under questioning by the Arbitrators, SWBT acknowledged that it has done no capacity testing of LFACS. SWBT's concerns over system integrity, therefore, are unsupported, especially given that LFACS appears to have capably absorbed the thousands upon thousands upon thousands of hits now being made to make CLEC loop qual inquiries, which the system was not originally designed to handle.

Rhythms Mitchell Rehearing Cross Exh. 3, at 10 (Arbitration Award, Complaint of IP Communications Corporation for Expedited Post Interconnection Preorder Information Required from Southwestern Bell Telephone Company to Submit Orders to Facilitate an xDSL Loop CLEC-to-CLEC Conversion, Docket No. 23309). The arbitrator stated that SBC's operating company, SWBT, had acknowledged it had never done any capacity testing on

LFACS, and thus SWBT's claims that LFACS might crash were completely unsupported. Id. at 9. For the same reasons, the Commission should reject SBC/Ameritech's claims of imminent systems collapse or other harm.

Moreover, the capacity of SBC/Ameritech's systems is not static. SBC/Ameritech Mr. Mitchell testified that SBC/Ameritech is "constantly upgrading and adding to [its] systems" to prevent its systems from crashing. Rehearing Tr. (Mitchell) 1729: 15-18. As SBC/Ameritech continually works to increase the capacity of its systems, there is no reason to believe that SBC/Ameritech's systems are nearing capacity and facing imminent failure.

Moreover, even if direct access results in additional inquiries or transactions, SBC/Ameritech's systems can handle the additional volume. Ameritech witness Mr. Mitchell testified that during LFACS was accessed over 75,000 times in March and over 42,000 times in April order to respond to CLEC loop qualification requests. Ameritech Rehearing Exh. 9.0 at 12. He further testifies that these numbers are too high, may be taxing the processing capability of LFACs, and could cause the system to fail. Rehearing Tr. (Mitchell), at 1720. Mr. Mitchell further testified that increasing the number of transactions by even one, let alone 40,000 or 80,000 could cause LFACS to collapse. Ameritech Rehearing Ex. 9.0 at 12-13. The record belies Mr. Mitchell's claims. Mr. Mitchell admitted during cross examination that he did not know, and had never asked a subject matter expert ("SME") how many simultaneous transactions LFACS can handle. Rehearing Tr. (Mitchell), at 1718:20-22; 1719: 1-10. Mr. Mitchell is unaware of any capacity testing SBC/Ameritech has ever done to determine the number of simultaneous transactions that LFACS can handle. Rehearing Tr. (Mitchell), at 1720:19-1721:2. Mr. Mitchell also lacks any knowledge on how many CLECs operate in Illinois, and therefore, how many CLECs might try to query LFACS through direct access.

Rehearing Tr. (Mitchell), at 1719:19-20. Thus, SB**C**/Ameritech has presented no evidence on which the Commission could determine that LFACs, much less any other OSS, is anywhere near its maximum transaction capability.

Moreover, SBC/Ameritech has committed to implement a new OSS loop qualification functionality, CR-69a, that will submit several transactions to LFACS in response to a single CLEC loop qualification request in an effort to locate an "optimal" xDSL loop. *See* Rehearing Tr. (Waken) 2646: 12-22; 2647: 1-7**.** As a result, the number of transactions submitted to, and processed by, LFACS will increase by several thousand a day, resulting in between 40,000 and 80,000 additional inquiries a month to LFACS. Rehearing Tr. (Mitchell) at 1765:14-17. SBC/Ameritech witness Mr. Mitchell admitted that SBC/Ameritech knew that such an increase in transaction volume would not cause its LFACS system to collapse. Rehearing Tr. (Mitchell) 1766:2-18; 1767: 1-22. Thus, SBC/Ameritech's claims of imminent systems failure from increased volumes are baseless. However, Mr. Mitchell's testimony also contradicts his assertions that too many inquiries could cause LFACS to crash. For example, Mr. Mitchell testified that he didn't think SBC/Ameritech would create a system that would have a secret limit on the number of users that once exceeded would cause the system to crash. Rehearing Tr. (Mitchell), at 1727:20-1728:3; 1729:20-1730:3. He also stated that "we're constantly upgrading and adding on to our systems which tells me in my mind that we are working to prevent systems from crashing . . . ." Rehearing Tr. (Mitchell), at 1729:15-18. Further, Mr. Mitchell admitted during cross examination that the number of transactions is the same whether inquiry is made through a gateway or direct access. Rehearing Tr. (Mitchell), at 1709:2-8. CLECs have been making queries into LFACS for many months, and so far LFACS apparently has not crashed. Mr. Mitchell testified that the CLEC gateways currently used for these queries do not perform

any type of queuing function, therefore, LFACS must be capable of handling the increased inquiries from CLECs. Rehearing Tr. (Mitchell), at 1746: 8-11. In fact, SBC/Ameritech systems are designed to run more slowly with greater number of users rather than crash. Rehearing Tr. (Waken) at 2637:11-15; *See* Rhythms Initial Br. at 51; Rhythms Ex. 4.0 at 24; Hearing Tr. (Jacobson) at 890:11-18. In sum, there is no evidence that direct access will cause any harm to SBC/Ameritech's systems.

Failing to prove his assertion that too many inquiries from CLEC's directly accessing LFACS would harm the system, Mr. Mitchell resorted to a claim that incorrectly formulated inquiries could harm the system. Rehearing Tr. (Mitchell), at 1710. However, Mr. Mitchell's assertion is not credible. He admitted he doesn't even know how to enter a query into LFACS, has "no direct experience at all" with any of SBC/Ameritech's OSS such as LFACS, SWITCH, TIRKS or ARES, is "not a technical person," has never used any of SBC/Ameritech's OSS (databases, computer systems or gateways) and has had only one 30 minute demonstration of Verigate, an SBC/Ameritech .Rehearing Tr. (Mitchell), at 1643:20-1644:1; 1638; 1662; 1666; 1714:14-16; 1716. Mr. Waken, who has considerably more expertise than Mr. Mitchell contradicted Mr. Mitchell's assertion that incorrect queries could harm the system. Mr. Waken testified that if an incorrect query were made through direct access, the system would give an error message and prompt the user to try the query again. Rehearing Tr. (Waken), at 2576:20-2577:3. Thus, Mr. Mitchell's assertion is clearly speculation, beyond his personal knowledge, and incorrect. The Commission cannot rely on such speculation as a basis for denying CLECs direct access to SBC/Ameritech's OSS.

H. SBC/Ameritech failed for the fourth time to prove that CLEC direct access would jeopardize customer safety or privacy

SBC/Ameritech also resurrects on rehearing its claims that direct access would endanger customer safety or privacy. Joint CLECs recommend that the Commission again reject SBC/Ameritech's baseless claims. On rehearing, SBC/Ameritech again raises the specter that CLEC employees would harm its own customers by using improperly customer information contained in SBC/Ameritech's systems. Other than conclusory allegations, SBC/Ameritech presented no evidence that such instructions would be misused by a CLEC to the detriment of a customer. Rehearing Tr. (Waken) 2612-2613; Hearing Tr. (Jacobson) 973-977.

Indeed, SBC/Ameritech witness Mr. Waken acknowledged that customer data contained in SBC/Ameritech's systems has been misused by ILEC employees who have access to such information. Rehearing Tr. (Waken) 2612: 8-22; 2613: 11-22. Mr. Waken stated that SBC/Ameritech has a "history of employees using information in inappropriate ways." Rehearing Tr. (Waken) at 2613:3-6. On the other hand, SBC/Ameritech did not provide any examples of CLEC employees using confidential information in inappropriate ways. Thus, direct access does not create any additional or unique security risks as SBC/Ameritech claims.

On rehearing, SBC/Ameritech regurgitates its earlier baseless claims that direct access by CLECs would disclose customer information such as non-published telephone numbers. SBC/Ameritech did not present evidence in the lower case that direct access risks CPNI or results in the disclosure of confidential information. *See* Rhythms Initial Br. at 52-53. SBC/Ameritech has not cured its evidentiary deficiencies on rehearing, and continues to rely on innuendo and conjecture. SBC/Ameritech goes so far as to claim that CLECs might use a non-published number to locate the cable pairs serving the person's telephone line and use that information to make unauthorized long distance calls without the end user's knowledge. Ameritech Illinois Ex. 13.0 (Waken) at 13. This is simply absurd. SBC/Ameritech has offered

absolutely no evidence to support its allegation that customer instructions or telephone numbers might be misused by a CLEC to the detriment of a customer. While Mr. Waken has stated that SBC/Ameritech has a history of its employees using inappropriately, he did not provide any actual examples of CLEC employees inappropriately disclosing or otherwise using confidential information. *See,* Rehearing Tr. 2613:3-7. Indeed, the record reflects that the security risk associated with persons accessing customer data, such as the location of a telephone line or cable pair applies, is a SBC/Ameritech employee problem and not employees. The Commission should see SBC/Ameritech's claims for what they are: scare tactics. Accordingly, the Commission should again rejected SBC/Ameritech's unfounded claims.

SBC/Ameritech's asserted concerns that CLECs could access loop information about other CLECs' customers are especially suspect given that CLECs do that currently through gateways. Rehearing Tr. (Waken), at 2600:2-16. In a letter to all carriers in June, SBC informed CLECs that other CLECs and SBC representatives may have accessed customer information belonging to the notified CLEC. Rhythms' Mitchell Rehearing Cross Exh. 4. Mr. Waken testified that Ms. Slocum's letter was merely an advisory and that SBC/Ameritech was doing nothing to stop CLECs or its own personnel from accessing CLEC customer information. Rehearing Tr. (Waken), at 2601:13-17.

I. SBC/Ameritech failed for the fourth time to prove that CLECs would not be able to understand or use data contained in SBC/Ameritech's backend systems and databases

Mr. Mitchell has asserted that CLECs should be denied direct access to SBC/Ameritech's OSS because they would encounter information that is "cryptic," "enigmatic," and "indecipherable." Ameritech Rehearing Exh.9.0 (Mitchell), at 12. However, Mr. Mitchell admitted during cross examination that ILEC employees get training so they can interpret the OSS data that they access. Rehearing Tr. (Mitchell), at 1702:11-21. Both Mr. Mitchell and Mr.

Waken confirmed that ILEC employees receive manuals, user guides and methods and procedures ("M&Ps") documents that translate each abbreviation and give all valid entries for fields in OSS such as LFACS. Rehearing Tr. (Waken), at 2553:15-2554:2. Mr. Waken himself is proof that the "indecipherable" information in SBC/Ameritech's OSS can be made understandable. Mr. Waken was able to interpret the data on sample screen prints attached to his testimony. One of those printouts was from LMOS, with which Mr. Waken testified he had only limited experience.

Mr. Mitchell claims that CLECs should be denied direct access because some of SBC/Ameritech's databases and systems contain redundant information. Rehearing Tr. (Mitchell), at 3-11. However, he conceded on cross examination that CLECs could likely figure out what data is redundant. Similarly, Mr. Mitchell claims that CLECs should be denied direct access because they might access irrelevant or outdated information. Rehearing Tr. (Mitchell), at 1694, 1696.

VII. SBC/AMERITECH FAILED TO DEMONSTRATE THAT THE COMMISSION'S RULING ON COST ISSUES WAS INCORRECT

A. The Commission's Order Setting The Monthly Recurring Charge For HFPL At $0 Is Correct And Should Be Upheld [53]

1. The Zero Monthly Recurring HFPL Charge Is Appropriate, As Determined Below, And To Set A Positive Price Would Be Against Public Policy And Result In An Unrecoverable Windfall To SBC/Ameritech

The Commission established a $0 ("zero") price for the HFPL in the underlying hearing, having determined, correctly, that a zero price complies with pertinent FCC pricing rules and reflects sound economic and regulatory policy. SBC/Ameritech has offered no new evidence to

[53] AT&T Communications of Illinois, Inc. and WorldCom, Inc. take no position on this issue.

support any change in the HFPL price. Further, there is no alternative that would otherwise prevent a windfall to SBC/Ameritech were the Commission to set a non-zero based HFPL price.

In the Line Sharing Order, the FCC set forth a simple prescription for establishing a price for line sharing:

> We conclude that, in arbitrations and in setting interim prices, states may require that incumbent LECs charge no more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services. This is a straightforward and practical approach for establishing rates consistent with the general pro-competitive purpose underlying the TELRIC principles. We find that establishing the TELRIC of the shared line in this manner does not violate the prohibition of section 51.505(d)(1) of our rules against considering embedded cost in the calculation of the forward looking economic cost of an unbundled network element. *Line Sharing Order, at ¶ 139.*

In its May 31, 2000, Access Charge Order, the FCC clarified that it intended this principle to be a limitation, and noted that incumbent local exchange carriers generally did not allocate any loop costs to ADSL service over home-run copper loops in their federal tariff filings for retail ADSL services. Specifically, in that decision, the FCC reiterated its prescription for pricing shared lines as follows:

> We also reject the argument that elimination of the PICC is inconsistent with the Line Sharing Order. The Line Sharing Order concluded that states *should not permit* incumbent LECs to charge more to competitive LECs for access to shared local loops than the amount of loop costs the incumbent LEC allocated to ADSL services when it established its interstate retail rates for those services. To date, we are not aware of any incumbent LECs that have allocated any loop costs to ADSL services. *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000). See, e.g., GTE Systems Telephone Companies, Tariff FCC No. 1, GSTC Transmittal No. 260 (Aug. 28, 1998).*

In fact, the FCC recognized that ILECs "generally allocate virtually all loop costs to their voice services, then deploy a voice-compatible xDSL service such as ADSL on the same loop, allocating little or no incremental loop costs to the new resulting service." *Line Sharing Order, at ¶ 41.*

2. Sound Policy Considerations Require A Zero Rate For The High Frequency Portion of the Loop.

Under sound economic principles, the use of the HFPL must be set at zero. The principles of cost causation dictate that there is no incremental cost associated with the CLEC's access to the high-bandwidth portion of the loop. Indeed, a price greater than $0 has no economic basis, would create economic inefficiencies and would promote bad policy.

As a threshold matter, it is important to recognize that regardless of the HFPL rate, CLECs will be paying substantial recurring and non-recurring charges to the ILECs in connection with line sharing. Contrary to the ILEC's claims, CLECs will not be receiving a free ride with a zero HFPL charge. Instead, what is at issue is an additional charge for access to the high frequency portion of the loop over and above the recurring and non-recurring charges. In this context, there is no economic or public policy rationale justifying an additional non-zero charge for access to the high frequency portion of the loop—to the contrary, the economic and public policy rationale strongly supports a zero charge.

As Rhythms' witness economist Terry Murray notes, a zero price for the HFPL is necessary to avoid economic discrimination. Rhythms Rehearing Exh. 3.0 (Murray), at 64:15-19; 67:7-9; 68:14-15. In the Line Sharing Order, the FCC observed that "incumbent LECs generally allocate virtually all loop costs to their voice services, then deploy a voice-compatible xDSL service such as ADSL on the same loop, allocating little or no incremental loop costs to the new resulting service." *Line Sharing Order, at ¶ 41 (footnote omitted).* Competitive parity

and the general requirement that incumbents not discriminate against competitors in pricing access to their network resources are by themselves sufficient bases upon which to require that incumbents similarly assign zero loop costs in pricing the high-bandwidth portion of the local loop. Rhythms Rehearing Exh. 3.0 (Murray), at 65:8-12.

The incumbent does not incur any additional loop cost when another carrier uses the high-bandwidth portion of the loop; therefore, any price greater than zero imposes a greater cost on competitors than the incumbent incurs. This differential treatment, where there is no difference in the underlying cost to the incumbent for providing access to the HFPL, is inherently discriminatory.

3. A Positive Rate For The HFPL Monthly Recurring Charge Would Result In A Windfall Profit For The ILECs.

Commissioner Squires asked parties to consider whether there is a workable solution to reduce the customer's network access line rate when the CLEC provides data over the HFPL, and, if not, whether there is an alternative method the Commission can use to ensure SBC/Ameritech is not afforded a windfall if a non-zero rate is set for the HFPL. SBC/Ameritech' witness Dr. Aron suggests that an additional charge for access to line-shared loops is not bad economic policy, yet at the same time she agrees that the revenue from an additional charge for HFPL would indeed provide a windfall for SBC/Ameritech. SBC/Ameritech Rehearing Exh. (Aron), at 42:47-43:16.

However, Dr. Aron's testimony appears only tangentially related to the Commission's list of rehearing issues, which specifically asks only for proposals for a "workable solution to reduce the network access line rate paid by a voice customer" should the Commission establish an additional charge for access to the HFPL (apparently as the result of some future proceeding).

It is the antithesis of good regulation to impose a price increase that would generate a windfall for a monopoly bottleneck element.

Dr. Aron's example of how competitors could enjoy the same windfall as SBC/Ameritech attempts to reverse the entire intended benefit of the FCC's mandate for incumbents to provide line-sharing arrangements. Dr. Aron's argument (ironically) requires an initial assumption that a competitor can "purchase the entire loop" and can reproduce the entire package of services that SBC-Ameritech provides as part of basic exchange service. A competitor that is able to purchasing the entire loop and displace SBC-Ameritech's basic exchange service would not require line sharing to offer xDSL-based services over the same loop. However, the FCC's mandate that incumbents provide line sharing is based on the presumption that competition in the market for xDSL-based services will not develop if carriers must reproduce the entire scope of SBC-Ameritech service offerings in order to compete on an equal basis with SBC-Ameritech. In summarizing its conclusion in the *Line Sharing Order*, the FCC states:

> …The record shows that lack of access to the high frequency portion of the local loop would materially raise competitive LECs' cost of providing xDSL-based service to residential and small business users, delaying broad facilities-based market entry, and materially limiting the scope and quality of competitors' service offerings. Moreover, access to the high frequency portion of the loop encourages the deployment of advanced telecommunications capability to all Americans as mandated by section 706 of the 1996 Act. Because some residential and small business markets may lack the economic characteristics that would support competitive entry in the absence of access to the high frequency spectrum of a local loop, it is clear that spectrum unbundling is crucial for the deployment of broadband services to the mass consumer market. *Line Sharing Order, at ¶ 25 (footnotes omitted).*

In determining whether to require incumbents to offer line sharing, the FCC considered several alternatives potentially available to xDSL competitors. These alternatives included

"purchasing the first loop as an unbundled network element," as Dr. Aron's example posits. The FCC concluded that each such alternative "either is significantly more costly or not available ubiquitously, or both." *Line Sharing Order, at ¶ 36*. Specifically, at ¶¶ 44-52 of the *Line Sharing Order*, the FCC considered and rejected scenarios parallel to Dr. Aron's example, ultimately determining that "[w]e find no evidence in the record to support the conclusion that a requesting carrier's ability to spread the costs of a loop between multiple services fully addresses a requesting carrier's impairment without access to line sharing."

Hence, the very basis for the FCC mandate to provide line sharing is at odds with the assumptions that Dr. Aron asks the Commission to make. It would be poor public policy and a violation of FCC guidelines to establish an additional charge for access to the HFPL.

Any mechanism to prevent a windfall in the face of a non-zero rate for the HFPL would be problematic. Any mechanism that provides an across-the-board credit to all SBC-Ameritech voice customers would be unfair to customers who subscribe to line-sharing arrangements. All customers would be paying the same amount for their loop facilities through the net price that they pay for retail basic exchange services, but customers who subscribe to line-sharing arrangements would be paying an additional amount for their loop facilities through the prices that they paid for xDSL-based services. This would occur because xDSL providers that paid a positive price for access to the HFPL would pass this cost of doing business along to the end users who purchased their line-sharing services.

There is no cost basis for requiring customers who subscribe to line-sharing arrangements to pay more for loop facilities than do customers who subscribe only to voice-grade services. As an SBC-Ameritech economic witness, Dr. Carnall, conceded earlier on this topic, SBC/Ameritech does not incur any incremental loop costs as a result of providing line-sharing

arrangements. (Case Below) Hearing Tr. (Carnall), at 984:12-22. Therefore, on average, customers who subscribe to both basic exchange service and line-sharing arrangements should not cause SBC-Ameritech to incur higher loop costs than do customers who subscribe only to voice-grade services. Imposing higher charges on customers who do not cause SBC/Ameritech to incur higher costs is unduly discriminatory.

The Commission could rectify this discrimination by requiring SBC/Ameritech to give each basic exchange customer subscribing to a line-sharing arrangement a dollar-for-dollar credit equal to the amount that SBC/Ameritech charges carriers for access to the HFPL. Presumably, this credit would offset the portion of the customer's price for line-sharing arrangements that compensates the xDSL provider for the cost of access to the HFPL. In theory, the customer would be in the same position as if the customer's xDSL provider paid a $0 price for access to the HFPL. In practice, the administrative costs associated with both creating a new pricing arrangement for access to the HFPL UNE and the customer-specific credit mechanism would make this approach less efficient than simply maintaining the current arrangement. The Commission should therefore not change its current policy by adding any additional rate element for access to the HFPL.

4. Establishing A Mechanism To Reduce or Eliminate the ILECs' Windfall Profits Would Be Contrary to FCC UNE Pricing Rules and Would Be Prohibitively Expensive To Administrate.

Even if the Commission could establish a mechanism to offset the windfall profits to the ILECs from a positive HFPL charge, such a scheme would be contrary to the FCC UNE pricing rules. Equally important, consumers would still pay unnecessarily high prices due to the administration associated with such an offset.

Access to the HFPL is an unbundled network element; therefore, the price for accessing the HFPL must comply with the FCC's pricing rules for unbundled network elements. The

FCC's pricing rules identify several factors that may not be considered in calculating the forward-looking economic cost of an element, including:

> *Revenues to subsidize other services*. Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established. *See* 47 C.F.R. § 51.505.

Hence, the FCC has expressly forbidden the inclusion of subsidies in the prices for unbundled network elements. The FCC's pricing rules embody Congress's determination in the Act to move away from implicit subsidies of universal service and instead rely on explicit subsidies. 47 U.S.C. § 254(k).

The Commission could theoretically create a mechanism to eliminate the windfall profits associated with a positive price for access to the HFPL that would not discriminate between customers or create a cross subsidy. However, such a mechanism would necessarily be cumbersome, would cause needless administrative expense, and is less efficient than maintaining the current zero price approach. Rhythms Rehearing Exh. 3.0 (Murray), at 69:2-6.

SBC/Ameritech, indeed, would incur costs for tracking the revenues for access to the HFPL and crediting them back to the basic exchange customer, as well as billing and collection costs for charging a positive price for access to the HFPL to the DSL provider. *Id.* All of these administrative expenses could be avoided by simply requiring the incumbents to make access to the HFPL available without charge, which is what the incumbents chose to do for their own DSL services before they were required to make line-sharing arrangements available to unaffiliated competitors.

No viable alternative exists that would preclude a windfall to SBC/Ameritech were the Commission to now set a non-zero based HFPL price. The most efficient approach is to maintain the current zero pricing for the HFPL. There is no new justification to change the

underlying HFPL findings in the record below. Sound economic policy and principles of efficiency mandate the Commission maintain its finding for a zero-based HFPL price.

B. The Commission's Order Setting The OSS Modification Charge At $0 Is Correct

SBC/Ameritech submitted one paragraph of testimony and a single page of costs in a futile attempt to convince the Commission that SBC/Ameritech should recover costs it has incurred and that it anticipates incurring to modify Ameritech Illinois' back-office systems for purposes of providing HFPL UNE. Ameritech failed miserably to establish these costs as legitimate in the case below and its effort this time is just as poor. Accordingly, Joint Submitters recommend that the Commission reject SBC/Ameritech's proposed OSS modification charge.

As discussed previously, the FCC concluded that incumbent LECs may only impose on line-sharing CLECs those OSS modification costs that were actually attributable to an ILEC's spectrum unbundling requirements. *Line Sharing Order*, at ¶ 106. The burden is on SBC/Ameritech to establish this point and the record in this proceeding does not demonstrate that SBC/Ameritech has met its burden. Yet, SBC/Ameritech essentially provided no back-up documentation for its proposed charges. A one-half page listing of six categories and corresponding dollar amounts is not sufficient as it does not provide Joint Submitters or the Commission the ability to assess the basis for such numbers, their accuracy and what caused SBC to incur such costs. For example, simply listing "Telcordia Enhancements To Legacy Back Office Systems to Support Provisioning and Maintenance of the High Frequency Portion of the Loop" with the note that costs provided are to "add basic functionality" is not sufficient information to determine precisely what functionality is included in the Telcordia package. Ameritech's Waken Rehearing Exh. 13.0P at Exh. E. Without more, the Commission does not have a satisfactory basis from which it can approve such proposed charges.

Moreover, wholly lacking from SBC/Ameritech's submission in this matter is a discussion concerning what costs SBC incurred for its own benefit. Under the Merger Order, SBC/Ameritech cannot now maintain that all of the OSS modifications are the result of the unbundling requirements included in the *Line Sharing Order*. Under the Merger Order, SBC was required to establish a separate data affiliate to provide DSL services. Merger Order Conditions, Appendix C, ¶1, 2. Thus, to satisfy its obligations under the Merger Order, SBC was legally required to develop OSS modifications to enable its data affiliate to order advanced services, including DSL via line sharing. *Id.* ¶3(d). SBC/Ameritech has not shown that CLECs independently caused all, or even part of, the proposed $29 million in OSS modification costs to enhance BOS for HFPL that it submitted.[54]

Thus, SBC/Ameritech has not met its burden as prescribed by the *Line Sharing Order*.

C. The Commission's Order Setting The Manual Loop Qualification Charge At $0 Is Correct

The Commission correctly rejected SBC/Ameritech's proposed manual loop qualification charge as inconsistent with a forward-looking cost analysis. The record in this proceeding amply demonstrates that the basic loop makeup information required to qualify loops for xDSL services is present in SBC/Ameritech's databases. Thus, as the Commission previously found, the forward-looking cost analysis should include data at the fully mechanized processing cost, and not at a manual cost. *See* Rhythms Initial Br. at 90 (citing Rhythms Ex. 1.0 (Murray) at 93-94; Rhythms Ex. 8.0 (Riolo) at 64).

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[54] In fact, in response to a discovery request in Ohio, SBC has already admitted that "all of the work effort by Telcordia would be required in order for Ameritech Ohio to supply services to AADS [its data affiliate]." Ohio Public Utilities Commission, Docket No. 96-922-TP-UNE, Ameritech Ohio response to @Link Networks, Inc. *et al*, 3d Set of Data Requests, Request No. 57. Thus, by SBC's own admission, its decision to create a separate affiliate caused SBC's incumbent LECs to incur all of the claimed OSS upgrade costs, even if Ameritech never had any obligations to provide line sharing to unaffiliated competitors.

SBC/Ameritech claims, however, that it should be able to charge CLECs a manual loop qualification charge because it has no obligation to provide loop make-up information in a mechanized format if it is not available. Ameritech Rehearing Ex. 6.0 (Welch) at 2. SBC/Ameritech's assertions of off the mark because the loop information at issue here is available in a mechanized format. Rehearing Tr. (Waken) at 2594-2596. SBC/Ameritech's LFACS and ARES databases contain loop information on every loop. Thus, SBC/Ameritech has accumulated and inventoried loop information in its databases long ago. SBC/Ameritech seeks to charge CLECs a manual loop qualification charge because its systems sometimes fail to pass the information electronically, despite the fact that it exists electronically, due to deficiencies in the systems. As this information exists electronically, it is inappropriate to charge CLECs for manual loop qualification.

Moreover, while SBC/Ameritech complains that manual loop qualification involves costs for manually collecting loop makeup information which it needs to recover, SBC/Ameritech is legally required to provide CLECs the ability to retrieve their own loop qualification information via direct, read-only access to LFACS and ARES. *UNE Remand Order*, ¶ 430. In other words, the "manual" work and associated cost that SBC/Ameritech has proposed is totally irrelevant. As SBC/Ameritech witness Mr. Welch details, manual loop qualification simply entails a SBC/Ameritech representative accessing LFACs and ARES, electronic databases, to retrieve loop information. Ameritech Illinois Rehearing Exh. 6.0 (Welch) at 4. Rehearing Tr. (Waken) at 2593:18-2594:1. SBC/Ameritech witness Mr. Waken admitted that CLECs could obtain the same information from ARES through direct access without requiring any SBC/Ameritech involvement. Rehearing Tr. (Waken) at 2597: 2-7.

In sum, as the Commission previously found, the best estimate of the efficient, long-run cost for the provision of loop makeup information that CLECs can in turn use to perform their own loop qualification information is $0. Other state commission, including Texas and Kansas, have similarly found that the appropriate TELRIC based charge for access to loop makeup information is at or near zero. Rhythms Initial Br. at 91. Accordingly, the Commission should reaffirm its prior Order.

Respectfully submitted,

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